

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

In the Matter of the Search of
INFORMATION ASSOCIATED WITH
“STACEYPROMRENKE@GMAIL.COM”
LOCATED AT GOOGLE, INC.

Case No. 1:16mj00073
MEMORANDUM ORDER

This matter is before the court on the Motion To Quash Search And Seizure Warrant, (Docket Item No. 3), and Amended Motion To Quash Or Modify Search Warrant And Objections To Proposed Order, (Docket Item No. 13) (“Motion”). The undersigned heard the Motion on June 7, 2016. Based on the arguments and representations presented by counsel, and for the reasons set out below, the Motion is **GRANTED** only insofar as the court will order certain modifications in the Government’s proposed process for protection of information protected by privilege.

Through the Motion, Stacey Pomrenke seeks to quash a search and seizure warrant issued by the undersigned on May 12, 2016, (Docket Item No. 2) (“Search Warrant”). The Search Warrant required Google, Inc., (“Google”), to turn over to the Government “any emails, records, files, logs, or information that has been deleted but is still available[,]” including the “contents of any communication or file” and “any information associated with those communications or files, such as the source and destination email addresses or IP addresses” for the email account of “staceypomrenke@gmail.com.” The Search Warrant allowed the Government to seize all information that constitutes fruits, contraband, evidence and instrumentalities of violations of 18 U.S.C. §§ 1512 and 401, obstruction of justice

and/or witness tampering and contempt of court, including, but not limited to, evidence indicating how and when the email account was accessed or used, the identity of the person(s) who created or used the user ID and the whereabouts of such person(s). At the time of issuance of the Search Warrant, Mrs. Pomrenke was awaiting sentencing in this court after her conviction by a jury on charges of conspiracy to commit program fraud, program fraud, wire fraud, wire fraud involving honest services fraud, making false statements and conspiracy to commit extortion related to her employment as Chief Financial Officer of Bristol Virginia Utilities, (“BVU”), Authority.

The Search Warrant was issued upon a finding by the undersigned that the Government had shown probable cause that the crimes of obstruction of justice and/or witness tampering and contempt of court had been committed and probable cause that evidence of these crimes existed in these electronically stored records. In particular, the Government had presented evidence in the form of an affidavit from Federal Bureau of Investigation, (“FBI”), Special Agent Thomas R. Snapp stating that, after Mrs. Pomrenke had been indicted, she had contacted potential Government witnesses regarding the charges against her. The Government included evidence that two weeks prior to her trial, Mrs. Pomrenke had sent an email from this account to several BVU Authority employees, who had been identified as Government witnesses, giving her “side” of certain evidence the Government intended to introduce at her trial.

In response to the Motion, the Government produced additional evidence that Mrs. Pomrenke’s husband, Kurt Pomrenke, left the following voice mail for Connie Moffatt, a BVU employee and potential Government witness, a few days before the

start of his wife's trial:

Hey Connie, this is Kurt, um, when you're testifying in that trial there might be a couple of things that you could do that would really help Stacey. If you could kinda slip in when you have a chance just little remarks like, how Stacey did a great job, or Stacey was the one that took care of the employees, or Stacey is just an honest ... just any, any kind of little comments you can make to support her or, Stacey was the one that always looked out for the employees, or, just just something like that even though it's not directly in response to the questions, if you could figure out a way to, to do that I really think that would help and make a huge difference. I'm sorry you're caught up in this, but we feel real good about the outcome and sure appreciate your help. Thank you, bye.

(Docket Item No. 6-2).

Mrs. Pomrenke's counsel argued that the Search Warrant should be quashed because the email account at issue had been used by Mrs. Pomrenke to communicate with her defense counsel and husband and, therefore, it would require Google to disclose privileged confidential information. Counsel also argued that the Search Warrant should be quashed as being overly broad with respect to the lack of a time limitation on the disclosure required by Google and in that it did not limit the disclosure to be made by Google to communications with identified potential witnesses. Her counsel also objected to the Government's proposed process for protection of information protected by the attorney-client privilege, arguing that it failed to provide for an independent filter team and failed to provide for the return or destruction of information disclosed by Google, but not subject to seizure, pursuant to the Search Warrant. Counsel also asserts that any effort to protect records which contained information covered by the attorney-client privilege should include

communication with attorneys Steven Minor and John Merrill, Joan Jackson, the assistant for her counsel, and retained expert witness Walter Jones.

The Government has proposed a process, including the use of a “filter team,” to protect any information covered by the attorney-client privilege from disclosure to anyone involved in Mrs. Pomrenke’s prosecution. The Government argued that there is no reason to quash the Search Warrant. It also asserted that the marital privilege would not prevent it from seeing communications between the Pomrenkes because the privilege is a testimonial privilege and would not bar the gathering of evidence of a crime. It further asserted that any information contained in this account that is subject to seizure under the terms of the Search Warrant would not be protected by this privilege because of the crime-fraud exception. In support of this argument, the Government asserted that it has produced evidence that both of the Pomrenkes were involved in an attempt to influence the Government’s trial witnesses.

Based on the above, I am persuaded that the account at issue contains electronic records covered by the attorney-client privilege. I also am persuaded, however, that the process proposed by the Government will adequately protect this information from prosecutors’ review with certain modifications. In particular, I will order that defense counsel provide a privilege list identifying any specific communications they assert are covered by the attorney-client privilege. I also will order that the process include communications to or from, or including phrases pertaining to, Steven Minor, John Merrill, Joan Jackson and Walter Jones.

I am persuaded that the Search Warrant, as issued, is not overly broad. The

Search Warrant lists with specificity the information to be disclosed and searched and the information to be seized. *See* FED. R. CRIM. P. Rule 41(e)(2)(A); *see also United States v. Robinson*, 275 F.3d 371, 381-82 (4th Cir. 2001), *cert. denied*, 535 U.S. 1006 (2002); *United States v. Torch*, 609 F.2d 1088, 1090 (4th Cir. 1979) (the degree of specificity standard is pragmatic, necessarily varying according to the circumstances and type of items involved). I, however, will order the Government to destroy or otherwise sequester the information disclosed to it, but not seized, pursuant to the Search Warrant.

In federal court proceedings regarding federal law, such as federal criminal cases, questions of evidentiary privileges are determined by federal law. *See* FED. R. EVID. 501, 1101(c), (d)(2); *United States v. Gillock*, 445 U.S. 360, 367-68 (1980). The law of evidentiary privileges under the federal common law is not static. “Federal Rule of Evidence 501 provides that privileges in federal court are to be ‘governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.’” *United States v. Dunford*, 148 F.3d 385, 390 (4th Cir. 1998).

Federal common law recognizes two types of marital privilege – the marital *testimonial* privilege and the marital *communications* privilege. *See Trammel v. United States*, 445 U.S. 40, 51 (1980). The marital testimonial privilege prohibits a spouse from being forced to offer testimony against his or her spouse. *See Trammel*, 445 U.S. at 53. The marital communications privilege protects information that is privately disclosed between spouses in the confidence of the marital relationship as privileged. *See United States v. Parker*, 834 F.2d 408, 411 (4th Cir. 1987). Marital communications are presumptively confidential. *See Parker*, 834 F.2d at 411.

Nonetheless, when marital communications are related to the commission of a crime in which both spouses are participants, the communications are not protected by the privilege. *See Parker*, 834 F.2d at 411 (recognizing “joint criminal participation exception” to marital communication privilege); *see also, United States v. Broome*, 732 F.2d 353, 365 (4th Cir. 1984), *cert. denied*, 469 U.S. 855 (1984). Furthermore, communications between spouses that are not private are not covered by the privilege. *See Pereira v. United States*, 347 U.S. 1, 6 (1954); *see also United States v. Hamilton*, 701 F.3d 404, 409 (4th Cir. 2012) (emails sent from husband to wife using workplace computer not protected by marital privilege).

In this case, Mrs. Pomrenke’s counsel argued that any emails between her and her husband should be protected from disclosure by the marital communications privilege. The court has little information before it regarding these communications, other than that they might be contained in the information disclosed pursuant to the Search Warrant. The court does not know whether any such communications were sent using privately owned devices over a privately owned network using private email accounts. Such facts would be crucial to a determination of whether the information conveyed was, indeed, a confidential communication, especially in light of the Fourth Circuit’s opinion in *Hamilton*, 701 F.3d 404. Since the federal common law presumes that marital communications are confidential, they must be treated as such until it is shown otherwise.

The Government also argued that these communications should be disclosed under the crime-fraud exception, which it appears should be more properly referred to as the joint criminal participation exception, to the marital communications privilege. As set forth above, marital communications that are related to the

commission of a crime, in which both spouses are participants, are not protected by privilege. *See Parker*, 834 F.2d at 411. The Fourth Circuit has held that this exception to the marital communications privilege is broad and it would apply to any statements made during the commission of a crime as well as statements made in “formulating and commencing” joint participation in criminal activity. *Parker*, 834 F.2d at 413. At issue before the court is whether the Government has made a sufficient showing to apply this exception to information to be disclosed and seized pursuant to the Search Warrant.

The court has found little case law addressing the showing necessary to apply the joint criminal participation exception to marital communications. *See United States v. Blaine*, 2012 WL 4473073, at *2 (E.D. N.C. Sept. 26, 2012). It is, of course, true that the party asserting a privilege bears the burden of establishing all of its essential elements. *See United States v. Acker*, 52 F.3d 509, 514-15 (4th Cir. 1995). The First Circuit has held that the Government “must produce evidence of a spouse’s complicity in the underlying, on-going criminal activity” before a court may apply the exception. *United States v. Bey*, 188 F.3d 1, 5 (1st Cir. 1999). However, the spouse’s participation in the criminal activity need not be significant. *See Bey*, 188 F.3d at 5; *United States v. Short*, 4 F.3d 475, 479 (7th Cir. 1993). While the Fourth Circuit, in a per curiam unpublished opinion, has stated that “mere allegations” are insufficient to force one spouse to testify regarding the other spouse’s confidential statements, *see United States v. Foresman*, 63 F. App’x 138, 140-41 (4th Cir. 2003), it has not precisely outlined the showing that would be necessary to allow the Government access to such communications during its investigation of alleged criminal activity.

In applying the crime-fraud exception to information protected by either the attorney-client privilege or the psychotherapist-patient privilege, the party asserting the exception is required to make a prima facie showing to the court that the communication falls within the exception. *See In Re: Sealed Grand Jury Subpoenas*, Case Nos. 1:11mc18, 19, Slip Op. (W.D. Va. Sept. 9, 2011) (citing *In Re: Grand Jury Proceedings #5*, 401 F.3d 247, 251 (4th Cir. 2005)). The required prima facie showing is described as being less than proof beyond a reasonable doubt or a preponderance of the evidence. *See In Re: Grand Jury Proceedings #5*, 401 F.3d at 251. Instead, it has been described as only such level of proof that would put the opposing party to “the risk of non-persuasion if the evidence ... is left unrebutted.” *In Re: Grand Jury Proceedings #5*, 401 F.3d at 251.

At the June 7 hearing, the Government admitted that it was investigating both Mrs. and Mr. Pomrenke for witness tampering. In issuing the Search Warrant, the court found that the Government had shown probable cause that Mrs. Pomrenke had violated 18 U.S.C. §§ 401 and 1512. I find that the evidence provided with the Government’s response to the Motion, if contained in a sworn pleading, would establish probable cause that Mr. Pomrenke, too, had engaged in witness tampering and/or obstruction of justice. I further find that this evidence would be more than sufficient to meet the prima facie showing required to apply the crime-fraud exception to information protected by the attorney-client or the psychotherapist-patient privilege. The court can think of no reason that the standard for applying a similar exception to the marital communications privilege should be any higher, at this stage of the proceedings. Also, the court holds that use of this standard strikes the proper balance between protecting marital communications yet ensuring the Government may fully investigate alleged criminal activity. It also

prevents the parties from litigating suppression issues, which may or may not be relevant at trial if charges are brought, at the investigation stage. *See In re Grand Jury Investigation*, 431 F. Supp. 2d 584, 589 (E.D. Va. 2006).

To protect the marital communications privilege, I will order that the filter team also must review all email communications between Mrs. and Mr. Pomrenke contained in the records disclosed to determine whether they were made in confidence or whether they should be disclosed pursuant to the joint criminal participation exception. Any of these communications which were not made in confidence, or which would be subject to seizure under the Search Warrant as evidence of the crimes of obstruction of justice and/or witness tampering, may be disclosed to the prosecution team.

It is so **ORDERED**.

ENTERED: June 21, 2016.

/s/ *Pamela Meade Sargent*
UNITED STATES MAGISTRATE JUDGE