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I N D E X

<u>Defendant's Witnesses:</u>	<u>Page</u>
ZAY THOMPSON	
Direct Examination By Ms. Brannon	16
STATEMENT BY MS. JACQUELYN ROKUSEK	31
Questions by Ms. Brannon	43
Questions by Ms. Barnett	49
MICHELLE JENSEN-SCHUBERT	
Direct Examination By Ms. Brannon	53
RICHARD NEY	
Direct Examination By Ms. Brannon	58
Cross Examination By Ms. Barnett	73
Redirect Examination By Ms. Brannon	78
QUESTIONING OF MR. RANDY RATHBUN	
Questions by Mr. Redmond	82
Questions Ms. Barnett	88
PROFESSOR PETER JOY	
Direct Examination By Mr. Redmond	91

E X H I B I T S

<u>Defendant's Exhibits</u>	<u>Offered</u>	<u>Received</u>
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1 (1:34 p.m., proceedings commenced).

2 THE COURT: All right. You can be seated.
3 All right. We're here in United States versus Lorenzo
4 Black, et al. The case number is 16-20032. Your
5 appearances.

6 MS. BARNETT: Debra Barnett, Assistant
7 United States Attorney, appearing on behalf of the
8 United States of America. Also with me at counsel's
9 table is Duston Slinkard, Assistant United States
10 Attorney. And then also joining us at the table is
11 Emily Metzger, Assistant United States Attorney.

12 THE COURT: All right.

13 MR. JENAB: Your Honor, Lorenzo Black is
14 present in person with counsel, John Jenab.

15 MR. GUASTELLO: May it please the Court.
16 Mr. Carter appears in person and in custody with
17 counsel, David Guastello.

18 MR. HOFFMAN: Mr. Aiono appears not but
19 through counsel, Jason Hoffman, Your Honor.

20 MR. JACKSON: If it please the Court. Your
21 Honor, Catherine Rowlette appears in person and by
22 counsel, Mike Jackson.

23 MS. BRANNON: Your Honor, Melody Brannon and
24 Kirk Redmond appear on behalf of Jermaine Rayton. Also
25 in Brenda Wood's case I filed a motion because-- to

1 participate in this hearing on her behalf because she
2 has overlapping issues. Both Mr. Rayton and Ms. Wood
3 would waive their appearance.

4 THE COURT: What's Mr. Rayton's first name
5 again?

6 MS. BRANNON: Jermaine.

7 THE COURT: Jermaine Rayton.

8 MS. BRANNON: And he's actually in BOP
9 custody now.

10 THE COURT: All right. And then I think Ms.
11 Ambrosio - could I see the notice, Bonnie - Ms. Ambrosio
12 has indicated that this doesn't pertain to her client.
13 She's never been in custody at CCA, so she's not here.
14 And then Ms. Dodge on behalf of Mr. Bishop could not be
15 here, but has joined in the motions and asked for leave
16 to perhaps have a hearing at a later date if she finds
17 that necessary.

18 All right. So we are here on the amended
19 motion of the Federal Public Defender for return of
20 property. And I think it was amended to attach a
21 transcript from a hearing that we had in this case, a
22 status conference and discovery hearing that we had in
23 this case last week or perhaps the week before.

24 So are you ready to proceed?

25 MS. BRANNON: Your Honor, if we may just

1 give a little bit of context to the Court about what's
2 developed in the last week and why there are so many
3 defense lawyers here perhaps.

4 Last week we discovered that the United
5 States Attorney's Office as part of the Black case had
6 subpoenaed from CCA all external and internal videotape
7 for a period from July of 2015 until April of 2016. We
8 have that subpoena marked and to be offered into
9 evidence.

10 That videotape includes video of all
11 attorney-client meetings in that time, not just
12 pertaining to Mr. Black, but every attorney-client
13 meeting that occurred at CCA in that 10-month period,
14 whether they're FPD, CJA, or retained. We understand
15 that the videotape-- or the video was there. We don't
16 know that there's audio. We know that there's a
17 capacity for audio.

18 This is why it's a problem, Judge. When we
19 go to CCA, every attorney that meets there had an
20 expectation of privacy. We expected that those meetings
21 with our clients were confidential. We expected that
22 those meetings with our clients were privileged. That's
23 always how it has been. That's what we understood from
24 CCA. And that was, in fact, not the case. CCA since I
25 believe 2008 has recorded every attorney-client meeting

1 at their facility.

2 Now, I take that back, because I believe
3 there are ten meeting rooms and I think two of them are
4 not videotaped, but the other ones are. And so if there
5 was a camera available to CCA, it was on and being
6 recorded. Notice to the defense counsel was never given
7 of this from CCA. The fact that the United States
8 Attorney has available to it this sort of legal
9 communication was never made known to the defense. We
10 only found out about it because it came out in the
11 Lorenzo Black case.

12 It's another problem because we don't know
13 if and when they've done it in any other case that the
14 defense has had with a client at CCA. So we'd like to
15 present evidence regarding this.

16 It came to light last week when Jackie
17 Rokusek was summoned to the U.S. Attorney's Office. And
18 she was told that - by I believe Erin Tomasic and Kim
19 Flannigan - that they had videotape of her meeting with
20 her client in another case, that their investigator was
21 going to review it, that they intended to review it.
22 And it was going to provide them with a basis to have
23 her conflicted off the case.

24 And so Ms. Rokusek asked for an opportunity
25 to view it a few days later. That was made available to

1 her. She confirmed that there is a videotape of her
2 meeting with a client. She confirmed that she was able
3 to view other attorney-client visitation that was going
4 on during this time.

5 The other problem that we have in this case
6 - and there are a lot of them - but the other problem is
7 not only does the U.S. Attorney have these, they were
8 ready to disseminate them to all of the defendants in
9 this case so far. We know from what they told the Court
10 that they intend to add more defendants. I think the
11 numbers were-- there may be up to 90 other inmates
12 involved. There may be up to 60 people outside. We
13 don't know how many of them would be indicted in this
14 case. All of them, all of those defendants, all of
15 those counsel would be given videotape or video of every
16 attorney-client meeting that happened at CCA in those
17 ten months.

18 So when I meet with my client who has an
19 interest in this, Ms. Wood, who has nothing to do with
20 this investigation, nothing to do with these
21 indictments, when I meet with her, what I review, what I
22 do with her, all of that would be available to every
23 other defense attorney that represents anybody related
24 to this case. That's why we're here. We want to figure
25 out what to do about this.

1 I think at the end of this hearing, which I
2 don't expect to be particularly adversarial, I think the
3 parties are going to propose to the Court appointing an
4 outside special master to investigate this. I think we
5 will have some protective orders that we will ask the
6 Court to consider, including taking into custody the
7 video and any copies of the video that are now in the
8 United States Attorney's possession to preserve them, to
9 preserve the data that is on them. There will be other
10 matters that we would ask the Court to take up in the
11 protective orders.

12 And finally, we will be asking the Court,
13 and I think the government joins in this, for an order
14 that all federal pretrial detainees will only be housed
15 at facilities that do not record attorney-client
16 communications, legal communications. And so that's
17 kind of an overview of the evidence and the context that
18 we have for the Court today.

19 THE COURT: Well, I'm a little unclear about
20 a couple of things that you said, and I suppose I can
21 wait to hear the evidence on this. But as far as the
22 recordings that you say have been occurring as far back
23 as 2008 and as they pertain to this case that we're here
24 today on from July of 2015 to April of 2016, you've
25 expressed concern that-- that the defense was not on

1 notice that the United States Attorney's Office had
2 access to this sort of information.

3 What I-- I guess what I'd like to focus on
4 is, is it-- do you have evidence that the United States
5 Attorney's Office has been getting access to this kind
6 of information outside the context of this case?
7 Because, of course, the context of this case has to do
8 with alleged transactions and contraband at CCA. And
9 when we were having this discovery conference last week,
10 the week before, whenever it was, I was trying to get
11 some sense of how-- how the defense might go about
12 discovering what they needed to discover in this huge
13 volume of recordings.

14 And so we had this whole-- if you read the
15 transcript, this back and forth about, you know,
16 presumably most detainees are going to be housed in
17 their pod most of the time and counsel can see what they
18 were doing while they were there. But as they moved
19 around the facility to medical or otherwise, would their
20 movements be recorded? And then there was a suggestion
21 that there are, you know, at least video-recordings,
22 recordings, something, as they moved around to meet with
23 their attorneys. And that this-- whatever their
24 movements were, all of the videos were-- were produced
25 or were going to be produced to the defense.

1 So my question is: Are the concerns because
2 of this huge volume of discovery in this case or do you
3 have some-- some indication that the U.S. Attorney's
4 Office has discovered tapes in unrelated cases for
5 unrelated cases? Is it just all about what's happened
6 in this case and discovering the whole body of
7 recordings?

8 MS. BRANNON: There are two problems. The
9 first is that CCA is recording this in the first place.
10 Not monitoring, but recording. That right there is a
11 violation, we believe, of the attorney-client privilege
12 of the legal communications going on in that room. Just
13 that they're recorded. They keep it for a number of
14 days. We don't know how long. We've heard from 30 to
15 120 days.

16 We do not know when-- if or when the U.S.
17 Attorney has asked for those recordings in other cases.
18 What we do know is they asked for it in this case. And
19 we were not aware, No. 1, that the recordings existed
20 ever, and No. 2, that the government had such ready and
21 easy access to them.

22 So the fact is, we don't know. And we think
23 that that would be one of the things for a special
24 master to investigate. Whether this was a routine
25 practice in Kansas City, Kansas, to do that and whether

1 it's been determined or used in any case.

2 We have evidence today about how CCA handles
3 those subpoenas and how they handle these requests. But
4 the point is, we're never given notice. We're never
5 given notice of the recordings. We're never given
6 notice of the subpoenas. It's by happen chance in this
7 case because the U.S. Attorney was actually using the
8 videotapes against counsel and against defendants that
9 it really came to light and began to develop. That's
10 the evidence that we believe the Court will hear. So
11 that's the issue with CCA.

12 The issue in this case is that they have ten
13 months of attorney-client legal communications videoed
14 in those rooms that the U.S. Attorney has in their
15 possession that until now they could've reviewed, they
16 could've used in any case. Any attorney in their office
17 would've had access to it in any case, including-- and
18 this is no accusation in my case. But, for example, in
19 Brenda Wood, if there was something about that case that
20 the U.S. Attorney wanted to use in that case, they have
21 possession of this now. They don't even have to go. So
22 it's preserved and in their custody. That's of great
23 concern to every lawyer in here.

24 The other part of that is that not only do
25 they have it and were they ready to review it and were

1 they-- they were ready to use it in their case, they
2 were ready to disseminate that to every other attorney
3 in that case or in any cases coming up.

4 So what the evidence will be today, Your
5 Honor, is we've got some evidence sort of laying out
6 what is going on at CCA, what the rooms are about,
7 issues of security. Ms. Rokusek is going to make a
8 statement to the Court explaining how she came to know
9 that they had possession of this, that they knew they
10 had possession. This was not inadvertent. They had
11 indexed it, they were-- had identified it, they were
12 using it in their case. This was not an inadvertent
13 seizure by the government.

14 We are going to ask that at some point Ms.
15 Rokusek, with protective orders from the Court, will
16 show the Court exactly what is on those tapes and how
17 she could access every other attorney-client visit that
18 is on those recordings. We will present evidence to
19 explain why, even if it is video communication, why that
20 is a great threat to us, why that is a violation of the
21 attorney-client privilege.

22 We will present evidence how this U.S.
23 Attorney access to confidential privileged information
24 between attorney-clients should not and is not, by DOJ
25 standards or other standards, that accessible. We will

1 present evidence about why this is a constitutional and
2 these are ethical violations against our clients and
3 against the attorneys by the U.S. Attorney's Office and
4 by CCA.

5 I don't know if that answers the Court's
6 questions or clarifies.

7 THE COURT: Somewhat. But let's proceed
8 with the evidence.

9 MS. BRANNON: Yes, Your Honor.

10 THE COURT: Ms. Barnett, or anyone at your
11 table, do you want to make any opening statement?

12 MS. BARNETT: Your Honor, I think the only
13 thing that I would say to the Court at this point is
14 that we do have the-- what we'll call the original copy
15 of the videotaped footage that was provided by CCA here
16 with us today, as well as a copy of that that was made.
17 We are prepared today to turn those items over to the
18 Court.

19 We agree that a special master should be
20 appointed to review those items and determine whether or
21 not they contain attorney-client privileged material,
22 because we feel that that determination needs to be made
23 before then we can adequately respond to and address to
24 the Court the other issues that are raised by the
25 Federal Public Defender's Office and the other defense

1 attorneys in this case. Thank you.

2 THE COURT: All right. Thank you. All
3 right. Ms. Brannon.

4 MS. BRANNON: Your Honor, if I may approach.
5 I have copies of the exhibits that we have today.

6 Your Honor, we call Zay Thompson to the
7 stand.

8 ZAY THOMPSON,
9 called as a witness on behalf of the Defendant, having
10 first been duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MS. BRANNON:

13 Q. Please state your name for the record, please.

14 A. Zay Thompson.

15 Q. And, Mr. Thompson, what do you do for a living?

16 A. I'm an investigator with the Federal Public
17 Defender's Office here in Kansas City.

18 Q. And how long have you been doing that?

19 A. Since-- I've been with the Federal Public
20 Defender since 2009. I've been up here since 2012.

21 Q. How long have you been an investigator?

22 A. Since 2000.

23 Q. All right. As part of your job as an
24 investigator, do you go to CCA routinely?

25 A. Yes, I do.

1 Q. And can you describe where that is?

2 A. It's in Leavenworth, Kansas.

3 Q. All right. Did you go there this week?

4 A. Yes, I did.

5 Q. On I believe was it yesterday?

6 A. I went yesterday, yeah.

7 Q. Yesterday.

8 A. Uh-huh.

9 Q. What did you do there yesterday?

10 A. I took photos and video of the professional
11 visitation rooms.

12 Q. And who else was with you?

13 A. David Magariel.

14 Q. That's how you say his name.

15 A. Good. Glad I got that right.

16 Q. Were there any-- anyone from CCA or the marshals
17 office with you?

18 A. Yes. The chief of security, Roger Moore, was
19 there. The warden was there for part of the time.
20 Craig from the U.S. Marshal's Office, a couple other
21 people I don't know.

22 Q. And what were you able to do while you were
23 there?

24 A. I inspected all of the professional visitation
25 rooms, took pictures of the cameras and the intercom

1 systems, and took some pictures of the rooms and the
2 hallways and took video of all of that. And also tested
3 the intercoms to see if they were all working.

4 Q. How long did it take you to do that?

5 A. We were there for about an hour, hour-and-a-half.

6 Q. How many visitation rooms are there?

7 A. There are nine.

8 Q. In the course of your work, have you been in all
9 of them for attorney-client visits?

10 A. Yes.

11 Q. While you were in there, did you have an
12 expectation that those were confidential communications?

13 A. Yes.

14 Q. But you knew that there were cameras in those
15 rooms?

16 A. In some of the rooms, yeah.

17 Q. Some of those rooms?

18 A. Uh-huh.

19 Q. You took-- you mentioned you took some videos--

20 A. I did, yeah.

21 Q. -- is that right?

22 MS. BRANNON: If it's all right with the
23 Court, we'd like to go through a couple of those videos
24 just to set the context.

25 THE COURT: That's fine. Are those marked

1 for-- as exhibits?

2 MS. BRANNON: They are not, Your Honor. We
3 thought-- we have photographs that basically capture
4 what's in the videotapes, but it's a little bit easier
5 to understand what's going on by videotape. We've made
6 all of them available to the U.S. Attorney's Office.

7 THE COURT: All right. So I-- I think that
8 the entire set of videotapes were-- I don't know if
9 they're audio and video, but the tape-recordings that
10 Ms. Barnett has indicated they have, the so-called
11 original set and the copies, need to be made part of the
12 record under seal at this point. So I think essentially
13 what you're going to be playing are excerpts of
14 something that's under seal. Or no, this is-- oh, no.
15 I'm sorry. This is created differently.

16 MS. BRANNON: Yeah. This is just a tour
17 sort of to let the Court know where the cameras are.

18 THE COURT: Demonstratively, okay. That's
19 fine.

20 MS. BRANNON: Exactly. And we certainly can
21 mark and put into evidence these videos. We have them
22 on a jump drive, I believe.

23 THE COURT: I'll leave that up to you. If
24 you just want to use it for demonstrative purposes,
25 that's fine, too.

1 MS. BRANNON: All right. Thank you, Judge.

2 Q. (BY MS. BRANNON) All right. What's the first
3 one that we have here?

4 A. It's all on one video file and I have it divided
5 up, so...

6 MS. BRANNON: And if it's acceptable with
7 the Court, I'm just going to ask Mr. Thompson to sort of
8 narrate as he's going through the video.

9 THE COURT: That's fine.

10 (Video was played).

11 A. So this is Room 107A. It's one of the first
12 rooms you encounter when you come into CCA. And there's
13 no cameras in this room. There's two intercom systems.

14 Q. (BY MS. BRANNON) Do they both work?

15 A. Yes.

16 Q. Okay. Are those phones used as part of
17 attorney-client communications?

18 A. I've never used them.

19 Q. And when you're there, you and the client are
20 placed into that room together for a contact visit; is
21 that correct?

22 A. Correct, yeah. These are contact visit rooms. I
23 just wanted to get all the-- every corner of the room to
24 show that there's no camera there.

25 And then this is one of the secure hallways. It

1 has three rooms, Rooms 4 through 6. And there is a
2 camera pointing to the east.

3 And this is a little intersection hallway that
4 connects that first hallway to the visitation area and
5 to a back hallway that has three more rooms. There's no
6 cameras in this intersection hallway.

7 Q. So looking down that hallway, is there a camera
8 that you saw that would monitor what happens in that
9 hallway?

10 A. No. The-- there's no camera. That's an
11 intersection hallway and then there's no camera in that
12 back hallway. And the video will go down there here in
13 a minute.

14 So what's up on the wall are lights over every
15 room.

16 Q. What do those lights do?

17 A. You can push a button in the room and it lights
18 up. And then when a guard walks by and sees a light on,
19 they can come check on you. And then they push a button
20 and turn the light off when they've checked. So I-- I
21 got both corners of that hallway. This is the-- this is
22 looking the other direction. And there's no cameras in
23 that hallway at all.

24 Q. In any of the rooms, the monitors, the audio
25 boxes, or the lights, are they labeled in any way?

1 A. Some of the intercoms say "Push for Service,"
2 something like that. But they don't-- the light button
3 doesn't say what it does.

4 This is Room 6. Just an example of one of the
5 rooms. It's a bigger room and it does have a camera in
6 it. It's got two intercoms and a light switch. And one
7 of the-- the intercom on the left doesn't work at all.
8 Chief Moore explained that. And it's not marked that it
9 doesn't work.

10 Yeah, you can see the camera in the back corner
11 over the door.

12 Q. Are you able to tell whether they are fixed
13 cameras or whether they can--

14 A. No, they had a dark dome around them, so I
15 couldn't tell what the actual camera was doing.

16 Q. All right. Is there more video that you wanted
17 to go through?

18 A. No.

19 Q. Okay. So you said there are nine total rooms and
20 seven of them have video cameras?

21 A. That's correct, yeah.

22 Q. Do all of them have some sort of intercom system?

23 A. Yes.

24 Q. And you mentioned that some of them have rooms
25 where the intercoms don't work. All of them have some--

1 one intercom that works; is that right?

2 A. Yeah, that's correct. And then some have another
3 one that doesn't work in there. And it's not marked
4 which one works or doesn't work.

5 Q. All right.

6 MS. BRANNON: If I could have just one
7 moment, Your Honor.

8 Q. (BY MS. BRANNON) All right. You took a series
9 of photographs; is that right?

10 A. Yeah, that's correct.

11 Q. Okay. If we can go to the first one, which I
12 believe is--

13 A. It should be 401 on there.

14 Q. You took-- okay. Very good. Can you describe
15 that photograph?

16 A. Yeah. These diagrams of the facility are hanging
17 in the hallways and it's for fire evacuation purposes so
18 any visitors know how to get out. So I took a picture
19 of it because it helps just explain where all the rooms
20 are at so I wouldn't have to draw it myself.

21 Q. I see I think six attorney rooms--

22 A. Yeah.

23 Q. -- on this.

24 A. These are-- the hallway where I took the most
25 video, the-- the hallway on-- on the top of the diagram

1 there with three rooms coming off of it, that one has a
2 camera. Then you have the-- the little intersection
3 between the hallways and then the back hallway with the
4 three rooms. And neither the intersection nor the back
5 hallway have cameras. And then the-- the little dark
6 lines coming out show the doors and show them opening.

7 Q. So can you indicate the three attorney rooms that
8 are not reflected on this chart, where they would be in
9 relation to the others?

10 A. Yeah. So there's a long hallway to the right and
11 with a door in the middle of it. The very right-hand
12 side of the-- the diagram. And that's 107A. And then
13 you go down in the down-- in the right-hand corner at
14 the bottom, you go through those doors and then there's
15 a long hallway with a control center there and then the
16 other two rooms, 107B and 107. And so those aren't
17 shown on the diagram. And they would be off the diagram
18 to the right at the bottom.

19 Q. The photographs that we have pulled to introduce
20 into evidence, they reflect every room that you went
21 into?

22 A. Yes, that's correct.

23 Q. And they reflect all of the cameras in those
24 rooms?

25 A. Yes, if they had cameras.

1 Q. If they had cameras. And they reflect all of the
2 audio communication devices in those rooms?

3 A. That's correct.

4 Q. Was there any signage outside these rooms saying
5 that there was any recording going on?

6 A. No, there wasn't.

7 Q. Did you see any signage at all while you were at
8 CCA or have you ever noticed any saying that legal
9 communications or attorney-client visitations were being
10 recorded?

11 A. No, I haven't.

12 Q. Did you have an opportunity to do some
13 investigation just online about CCA?

14 A. Yeah, I checked out their website.

15 Q. And what did you find on the website?

16 A. There were several places where CCA's website
17 said that clients are provided-- that inmates are
18 provided with confidential access to their attorneys.

19 Q. Was there anything on their website that
20 indicated there was any recording?

21 A. No, there wasn't.

22 Q. Okay. I'm going to refer you to Defendant's
23 Exhibit 435.

24 MS. BRANNON: If I may approach Mr.
25 Thompson, Your Honor.

1 THE COURT: Yes.

2 Q. (BY MS. BRANNON) Is that a copy of what you
3 pulled off of the website?

4 A. Yes.

5 Q. And does it include the representations from CCA
6 that you just talked about?

7 A. Yes. On Page 2, it says, "Access to the court
8 system and confidential contact with their attorneys."

9 Q. Have you found in your research and investigation
10 of this case anything that publicly notifies any
11 attorneys or anyone associated with attorneys, such as
12 investigators, that these visitation rooms are recorded?

13 A. No. Nothing public.

14 Q. Now, as part of this, did you call CCA and just
15 ask?

16 A. Yes, I did.

17 Q. And when was that?

18 A. Could I refer to my report?

19 Q. Sure.

20 A. I believe it was-- I believe it was 8-5, but I'm
21 not sure.

22 Q. And this has been marked as Exhibit 434.

23 A. Okay. So I-- I called on August 4th this year
24 and I called the chief securities office. He was on
25 leave. I talked to his administrative assistant, Betty

1 Rumas, and she talked to Sergeant Wayne Bigelow. Wayne
2 said that the visitation rooms were not subject to video
3 or audio-recording. I called back to make sure that
4 they knew I was talking about the legal visitation
5 rooms, and they confirmed that those are not subject to
6 video and audio-recording.

7 So then on the next day, on the 5th, I called
8 back to CCA and spoke directly with Sergeant Bigelow,
9 thinking maybe, you know, wires got crossed, it was a
10 game of telephone or something since I hadn't talked to
11 him directly. I told him that we received information
12 that the attorney rooms were actually recorded and asked
13 him about that. He again said that they weren't and--
14 but asked the maintenance supervisor, who then corrected
15 him and said that six of the attorney rooms had video
16 cameras in them, that CCA does record the video footage
17 but not the audio footage. And they keep the
18 video-recordings for 30 days, and they've been doing
19 this since 2008.

20 Q. Before you called them back on that Friday, did
21 you have other conflicting information about whether
22 they were recording or not?

23 A. Yes. We-- I-- I saw an e-mail from the U.S.
24 Marshals in Missouri who said that CCA-- that CCA told
25 them that they are video-recording the legal visitation

1 rooms.

2 Q. And could you identify each of those exhibits
3 that I've just handed you?

4 A. Yeah. 443 is an e-mail that's from Debra Barnett
5 of the U.S. Attorney's Office saying that U.S. Marshal
6 Deputy Troy Oberly agreed to find out what's going on at
7 CCA. That the visitation rooms have a panic button in
8 order to contact Control if there's an issue and the
9 attorney or client needs help. If the panic button is
10 activated, there's a camera in the visitation room that
11 Control can activate to see what's going on in the room.
12 There's no recording function associated with this
13 camera or panic button. And there's-- she reiterates
14 there's no way to record visual or audio with this
15 camera. And then goes on to explain why the panic
16 button was installed.

17 Q. So at that point you had called CCA and they had
18 said that there was no recording and we had this
19 particular e-mail assuring that there was no recording?

20 A. That's correct.

21 Q. And then the next exhibit that you have, the
22 Western District e-mail, that-- where was that in the
23 timeline of these exhibits that we're talking about?

24 A. So the e-mail from Deb Barnett is 2:51 p.m. on
25 August 4th. And there's an e-mail from Scott Seeling at

1 3:37 on August 4th. And that's Defendant's Exhibit 441.

2 Q. And what information do we get from Scott Seeling
3 about CCA recording?

4 A. He said that attorney visits were not
5 audio-recorded, they were video-recorded. Attorney
6 phone calls were not recorded. Video-conferences, they
7 don't do video-conferencing with the federal defender.
8 And then let's see-- actually, I'm sorry, that's
9 Caldwell County, let me go down to CCA. He gave a
10 variety of information about different facilities in
11 Missouri. CCA attorney visits not audio-recorded,
12 attorney visits are video-recorded, phone calls not
13 recorded. What the attorney--

14 THE COURT: Can you slow down, please,
15 because I'm not finding-- this is Exhibit 441?

16 THE WITNESS: 444.

17 A. Video-conference with attorneys not recorded.

18 Q. (BY MS. BRANNON) Going back to Exhibit 434,
19 which is your investigative report, did you also survey
20 the other facilities in Kansas that hold pretrial
21 detainees, federal pretrial detainees.

22 A. Yes. I called Atchison jail, Leavenworth jail,
23 and Wyandotte jail. And Atchison and Leavenworth do
24 record-- video-record the attorney rooms. Wyandotte
25 does not. Atchison and Leavenworth do keep the

1 recording for a period of time, and Wyandotte said they
2 don't because it's attorney-- attorneys meeting with
3 their clients.

4 Q. In all of this investigation when you were
5 talking to any facility, did you distinguish in your
6 questioning between mere monitoring by video and actual
7 recording?

8 A. Yes.

9 MS. BRANNON: Your Honor, we would go ahead
10 and move for admission, in fact, of all the exhibits
11 before the Court. We've reviewed them with the
12 government, I believe they have no objection.

13 THE COURT: That's Exhibits 434 through 448?

14 MS. BRANNON: Yes. And we will also provide
15 the Court with hard copies of the photographs that Mr.
16 Thompson reviewed.

17 THE COURT: All right. Exhibits 4-- 434
18 through 448 admitted.

19 MS. BRANNON: We have no further questions
20 for Mr. Thompson.

21 MS. BARNETT: I have no cross examination,
22 Your Honor.

23 THE COURT: All right. You can step down,
24 Mr. Thompson. All right. You can call your next
25 witness.

1 MS. BRANNON: Your Honor, we'd call Jackie
2 Rokusek. And while she's coming forward, Your Honor, in
3 talking with the U.S. Attorney's Office, because she's,
4 in fact, an officer of the court, I think we've agreed
5 to offer and ask the Court to allow her to make a
6 statement. If we have follow-up questions, we can
7 certainly let the Court know. We've also-- I think Ms.
8 Rokusek can address any concerns about privileged
9 information as part of her statement, but we've reviewed
10 it and I-- I think we've resolved most of those issues.

11 THE COURT: All right. No objection to that
12 procedure?

13 MS. BARNETT: No objection, Your Honor.

14 THE COURT: All right. That's fine.

15 STATEMENT BY MS. JACQUELYN ROKUSEK

16 MS. ROKUSEK: Judge, as an initial matter,
17 obviously I will be testifying to matters that pertain
18 to a client of mine, actually several clients of mine,
19 Richard Dertinger and Petsamai Phommaseng, and would ask
20 that the Court order that my testimony be allowed today
21 without creating a conflict of interest.

22 There's also the videotape that we're asking
23 to review with the Court in chambers, and I would ask
24 that the Court order that we review that for the limited
25 purpose of showing the Court what is on that video,

1 again, without creating conflicts on the case.

2 THE COURT: All right. So the videotape has
3 to do with you visiting one or both of these clients?

4 MS. ROKUSEK: Correct.

5 THE COURT: I will review-- review those in
6 camera. And then you're asking that your statement not
7 be deemed to place you in a conflict of interest with
8 respect to representation of-- of either client?

9 MS. ROKUSEK: Correct, Your Honor.

10 THE COURT: All right. I'm not entirely
11 clear the nature of your statement and how that would
12 impact the conflict. But for now, that's fine, you can
13 proceed.

14 MS. ROKUSEK: Okay. Your Honor, the way
15 that this initiated was on August 2nd of 2016, in the
16 morning, I received a phone call from Special Assistant
17 United States Attorney Erin Tomasic. Ms. Tomasic
18 indicated that Kim Flannigan had been e-mailing me for
19 the past three days, she inquired of whether I had taken
20 some extended leave of absence because I hadn't
21 responded to their e-mails.

22 I indicated to them that I had not received
23 any e-mails, and she indicated to me that she was cc'd
24 on them, so she knows that I did, and that they needed
25 to meet with me on either August 2nd or August 3rd

1 pertaining to the Richard Dertinger case. I asked them
2 what this meeting would be about. They indicated it
3 needed to be in their office and that they weren't going
4 to disclose what it was about over the phone.

5 Mid-morning that day, I received a phone
6 call from a co-defendant on the Dertinger case, William
7 Session, who provided me with some information that led
8 me to believe that perhaps I should go to this meeting
9 at 3:00 that we had scheduled at the U.S. Attorney's
10 Office to figure out what was happening on the Dertinger
11 case.

12 At 3:00 I met with Kim Flannigan and Erin
13 Tomasic at the U.S. Attorney's Office in the large
14 conference room. I was told that they were holding this
15 meeting at-- at the U.S. Attorney's Office instead--
16 instead of filing a motion to ask to have me withdrawn
17 from the Dertinger case due to an alleged conflict of
18 interest that I had on the case based on information
19 they had in their possession at that time.

20 They indicated that they wanted to do this
21 because Erin Tomasic said that I had perceived some of
22 her actions in the past as something that was intended
23 to have me conflicted off the case, such as when they
24 were alleging that my fee may have been improper--
25 improperly taken in the Dertinger case.

1 I asked them what this was regarding. They
2 told me that there were two proffers that they had
3 received on another case, the Black case, the case
4 we're-- that is before the Court at this time. They
5 told me that in one of the proffers an individual had
6 told them that I had provided a-- a report from another
7 case to my client. That Court [sic] was subject to a
8 protective order and that my client had provided
9 information allegedly to other people in the pod, which
10 had jeopardized their investigation in the Black case
11 and that they intended to pursue an obstruction charge.

12 The second defendant allegedly proffered
13 that I had reviewed in-house proffers and shared that
14 information with my client, Richard Dertinger, who had
15 then shared information at the-- with others in the pod.
16 I confirmed with them that, in fact, I hadn't reviewed
17 the proffers in-house yet. I had been reviewing the
18 other volumes of discovery we had been provided.

19 They acknowledged that, in fact, they
20 reviewed not only my visitation log at CCA but also the
21 in-house proffer log and, in fact, I had not reviewed
22 the in-house proffers as of that time, but they had
23 reason to believe that it would-- it would create a
24 conflict of interest under Rule 3.7, and that I should
25 contact Stan Hazlett to discuss that and let them know

1 within a week as to whether or not I intended to
2 withdraw.

3 At the-- near the conclusion of this
4 conversation, I was informed by Ms. Flannigan that they
5 had a case agent on the case who was reviewing
6 attorney-client meetings from CCA to determine whether
7 or not this document had been provided to Richard
8 Dertinger, which I told them it had not.

9 I left there and contacted Laura Shaneyfelt
10 to talk about the fact that I believed now, in fact, we
11 had attorney-client privileged meetings which had been
12 recorded. I confirmed that by contacting--

13 THE COURT: If I could stop you just for
14 clarification. So what was represented to you was that
15 an investigator on behalf of the U.S. Attorney's Office
16 was reviewing your contacts with Mr. Dertinger.

17 MS. ROKUSEK: Dertinger, uh-huh.

18 THE COURT: I mean, were they specific logs,
19 recordings, what was told to you at that point?

20 MS. ROKUSEK: That the case agent was
21 reviewing the videos to determine whether or not I had
22 provided the document and that all he had seen so far
23 was me walking down the hall. That was the-- what they
24 had told me, but that he would be reviewing those.

25 I then followed up and e-mailed both of them

1 back, indicating that I would like to review the videos
2 myself before making any decision on how to proceed with
3 the case, because I wanted to confirm whether, in fact,
4 they had attorney-client meetings videotaped from CCA.

5 It was August 3rd, 2016, Ms. Flannigan then
6 responded, asking me why it is-- telling me I didn't
7 have to respond, but why would I need to see that before
8 I made a decision? And I told her I just-- I wanted to
9 see the videos.

10 I then received an e-mail from Erin Tomasic
11 indicating that I could come up and review those, that
12 they would be made available to me. I received a
13 separate e-mail from Ms. Flannigan indicating that
14 because I had a deadline on another case, she was urging
15 me to come up right away and review those videos.

16 I then told them that I had a plea on
17 August 4th, which would've been the next day, at 9:30 in
18 front of Judge Murguia, that I was available to review
19 the videos after that time. I came up to court to do
20 the change of plea hearing at-- during the change of
21 plea hearing, there was an e-mail sent to me from Ms.
22 Tomasic indicating that Pauletta Boyd, who was-- who's
23 the IT person in the office, could not be located, that
24 the agent was on vacation, and that no one else in the
25 office knew how to operate the system. And, therefore,

1 I would have to wait until another date to review the
2 video.

3 I then told them that I would be in the
4 courthouse. I gave them my cell phone number and told
5 them to contact me when they located Ms. Boyd and that I
6 would come at that time. I later received a phone call
7 and an e-mail from Ms. Tomasic indicating that they
8 didn't believe she was there that day, they didn't know
9 where she was, and that I would have to come back at
10 another time.

11 The very next day, on August 5th, I
12 contacted them again. Ms. Boyd was in the office. I
13 went up to the U.S. Attorney's Office at approximately
14 2:00 in the afternoon, 2:15, with Michael Bussell, who's
15 my private investigator on the Richard Dertinger case.
16 At the same time in the lobby, Shazzie Naseem was
17 present. He was also there to review the videos on that
18 date, but I had already made the appointment to view
19 those, and so Mr. Bussell and I went into the conference
20 room at the U.S. Attorney's Office.

21 Ms. Boyd showed us how to use the system,
22 which is designed-- I had pulled my logs from CCA to
23 determine when I visited my client, so I knew what dates
24 and what time I would've been in the facility. I then
25 was-- we were then shown how to use the system. And we

1 would go to the date in question and the time in
2 question. And you could pull up multiple panels, if you
3 will, or windows to look at different visitation rooms
4 or different locations within the facility, whatever you
5 were looking at.

6 We were provided an index by Ms. Boyd, which
7 was left in the room. That there were six boxes and she
8 showed us the boxes. And the boxes, they're like a
9 large VCR box, but they're metal. You place it into a
10 white box, which is on the prosecution table, the
11 reader. And then once it's in the reader, you can pull
12 up information.

13 And on the index of the six boxes, the first
14 box contained information that didn't pertain to
15 attorneys, as did the second, third, and fourth. The
16 fifth box had one attorney room and then the sixth box
17 had Attorney Room and then Attorney Room 1 through 6.
18 We chose that box based on the limited amount of time we
19 had in the courthouse to review the video.

20 We were able to ascertain where on the
21 system my visitation occurred. And we opened up several
22 windows so we could try to look at several at a time.
23 We were able to view visits with two of my clients at
24 the same time. And then inadvertently, the-- once you
25 watch the video for a period of time, it stops, you must

1 then - it's complicated - but go to another-- click on
2 another icon, which will take you back, and then you
3 restart it where it picks up.

4 At one point, we inadvertently hit the wrong
5 date and we were watching somebody else entirely
6 different. It wasn't my client, it wasn't the room we
7 were in. It was another attorney-client meeting room.
8 So I could've watched anybody that was in the facility
9 at any time which is contained on Box 6.

10 The video itself is in color. The-- the one
11 room we were in had pan, tilt, and zoom functions. So
12 we could zoom in, zoom back, move around the room. But
13 at-- the room we were in was the larger room at the far
14 end of the hallway, which was described on the exhibit.
15 I was on one end of the table, my client was on the
16 other end of the table, and Mr. Bussell was in the
17 middle of the two of us at the table. And you could see
18 everything in the room, what you were wearing, who was
19 in the room, it-- it was very good quality.

20 THE COURT: Could you-- could the camera
21 train on people's faces and could it also train on
22 documents that were being shown or shared or-- assuming
23 there were any?

24 MS. ROKUSEK: You can. When we did use the
25 zoom function, it was somewhat pixelated, which, of

1 course, can be I'm sure sent off and-- and fixed. But
2 it wasn't pixelated when it wasn't zoomed all the way
3 in. If you tried to zoom all the way in, you could not
4 do so based on the pixelation. But I can tell you that
5 I could tell that certain documents were Excel
6 spreadsheets. I could tell that certain documents were
7 reports. And you could see everything else in the room
8 very clearly.

9 It became very obvious to me at that point
10 what had occurred, so I then responded back to the U.S.
11 Attorney's Office in an e-mail, asked that no staff
12 member, attorney, agent of the government be allowed to
13 view, edit, or otherwise have access to those videos
14 until a decision was made by the Court. And there--
15 there was an agreement that they would not review those.

16 I was made aware at a later date that a case
17 agent did have a copy of the videos himself. The U.S.
18 Attorney has-- has indicated that they asked that agent
19 not to review that as well, but that those particular
20 copies were not held in the vault that the U.S. Attorney
21 agreed to hold the in-house copy in during that same
22 time frame.

23 I don't know the full extent of what was
24 reviewed by the U.S. Attorney's Office, but I know that
25 they knew it existed. That apparently someone was

1 reviewing it to-- to determine what happened during an--
2 an attorney-client meeting between my client and I. It
3 was the first time that I was made aware of it was in
4 early August. And further, I-- I felt like it was used
5 to leverage a conflict of interest and have me removed
6 from a case.

7 It was for those reasons that I brought it
8 to the attention of Ms. Shaneyfelt and, ultimately, it
9 became before the Court.

10 THE COURT: And again, this is in a case
11 totally unrelated to this case, the Lorenzo Black case?

12 MS. ROKUSEK: My client's name is-- is
13 listed on the indictment as an unindicted
14 co-conspirator.

15 THE COURT: And you represent that client.
16 Is that a case in front of Judge Murguia that has
17 charges that are similar to the charges in this case?

18 MS. ROKUSEK: My client, in front of Judge
19 Murguia, he is indicted on a marijuana conspiracy case.

20 THE COURT: It's not having to do with
21 contraband at CCA, it's a-- it's a--

22 MS. ROKUSEK: No. But he is-- what I can
23 inform the Court is that I was told by Ms. Flannigan
24 prior to his plea that he was-- that they had
25 information that he had been distributing K2 and that he

1 had better stop.

2 Later, I was informed that they intended--
3 they weren't certain whether he would be indicted in
4 this case or not, in the Black case, that that decision
5 had not yet been made, but they did intend to use
6 information from that investigation to pursue
7 obstruction. Whether it's a new charge or an
8 obstruction on the sentencing, I'm not certain. And so
9 I've been-- I've been given access to the discoverable
10 material because of their intent to use it to enhance my
11 client's sentence.

12 THE COURT: And the first time you had
13 contact from the U.S. Attorney's Office about the
14 situation with this client concerning-- I mean, that at
15 all talked about your visitations with him and
16 recordings or whatever was August 2nd or was it earlier
17 than that?

18 MS. ROKUSEK: Technically it was earlier.
19 Ms. Flannigan sent an e-mail to an iCloud account that
20 I-- I don't know where that-- I don't know if that's
21 something that is on my phone or something, but it's
22 not-- it's not my ECF e-mail. It's not an e-mail system
23 that I even use.

24 So there were-- there were two or three
25 e-mails, Ms. Tomasic said three, Ms. Flannigan said two

1 e-mails, had been sent to me on the Thursday prior and
2 the Friday prior and then that same-- it must've been
3 Thursday, Friday, Monday. And they finally called me on
4 Tuesday because I had not received any e-mails from
5 them.

6 THE COURT: All right. Are there any
7 questions?

8 MS. BRANNON: May I approach Ms. Rokusek?
9 Would you please go through those exhibits and describe
10 them and their significance to you?

11 MS. ROKUSEK: Defendant's Exhibit No. 441 is
12 an e-mail that's from Kim Flannigan in the U.S.
13 Attorney's Office indicating to me-- and I'll back up.
14 Oh, I'll start-- I'll start from when the e-mails
15 initiated.

16 At 11:47 a.m. on August 3rd, 2016, I
17 e-mailed both Kim Flannigan and Erin Tomasic, indicating
18 that I wanted to contemplate how to move forward
19 regarding the potential conflict of interest discussed
20 at their office on the day prior. Particularly as it
21 related to reviewing the video visits between Mr.
22 Dertinger and myself at CCA. And I asked for an
23 opportunity to review that video footage before making
24 any final decisions, and I asked them if that could
25 happen within the next few days.

1 I did receive a response at 5:41 p.m. from
2 Ms. Tomasic on August 3rd, same date, indicating that it
3 was available in-house anytime that I wanted to view it.
4 The agent had looked through the video for my visits and
5 said he has to locate the time and date of the visits
6 but hadn't paired them up to the video yet. And she
7 also indicated that the agent was on vacation this week
8 and was preparing for a hearing the next week, and it
9 may take him a while to pull the video for me.

10 At 6:10 on the same date, August 3rd, Ms.
11 Flannigan e-mailed me and stated that she knew I had a
12 deadline on my other case and indicated that she thought
13 I should try to come over and find the video myself.

14 Defendant's Exhibit 442 is another e-mail
15 exchange between the parties, first initiated on August
16 4th at 6:52 p.m., where I reached out to both Ms.
17 Tomasic and Ms. Flannigan indicating to them that I was
18 asserting the attorney-client privilege, as I had never
19 waived it due to the fact that I had never known that I
20 was being recorded while visiting my clients at CCA.
21 And this is the e-mail where I asked that they refrain
22 from reviewing the videos and prevent anyone else, to
23 include staff, case agents, or other agents of the
24 government, from reviewing the video before I had an
25 opportunity to review them and to make a decision

1 regarding any dissemination of the videos.

2 I received the response from the U.S.
3 Attorney's Office the next morning at 9:19. Ms. Tomasic
4 indicated that she understood the position and didn't
5 intend to review it until the matter was resolved and
6 that she would instruct all pertinent parties, to
7 include the case agent.

8 And then again, she clarified at 9:33, just
9 a few-- or a few minutes later, that they intended to
10 continue to review the CCA footage, but the agent and
11 staff will refrain from viewing any video depicting
12 attorney-client exchanges if any such videos exist.

13 Defendant's Exhibit 439 is a copy of the
14 index that was provided when I was present with Mr.
15 Bussell at the video viewing room at the U.S. Attorney's
16 Office. And highlighted on this defendant's exhibit are
17 the attorney rooms. DVR No. 5 has a Low Custody
18 Attorney, and then DVR No. 6 has Attorney Room and then
19 Attorney Room 4, 5, 6, 7, 8, and 9.

20 The other DVRs are of other areas located
21 within CCA.

22 MS. BRANNON: And, Ms. Rokusek, those
23 highlights were not on the index you saw in their
24 office?

25 MS. ROKUSEK: No.

1 MS. BRANNON: That's what we did. Right?

2 MS. ROKUSEK: Correct. The highlights were
3 not on that.

4 MS. BRANNON: And I-- I don't know if you
5 can-- what number are you looking at?

6 MS. ROKUSEK: Oh, Defendant's Exhibit
7 No. 440 is a document which was provided by the U.S.
8 Attorney's Office on today's date indicating that the
9 index was created by Pauletta Boyd with the U.S.
10 Attorney's Office on June 10th, 2016 at 12:24:48 and
11 later modified on August 8th, 2006 at 4:58:45.

12 And I would note that, for the Court, that
13 in looking at the actual video itself, if you were
14 looking at that, you wouldn't know that was an
15 attorney-client room unless you were actually looking to
16 see what was going on in the room because, otherwise,
17 when the room is empty it's just a table and some chairs
18 that you're looking at. So someone would actually have
19 to look at this to determine what it's actually
20 depicting in order to make the index.

21 MS. BRANNON: There's not a caption saying
22 this is an attorney-client visitation room?

23 MS. ROKUSEK: No.

24 MS. BRANNON: If I could just have a couple
25 of follow-up questions. The iCloud e-mails that they

1 referenced, did you ever locate those or did they ever
2 provide those to you?

3 MS. ROKUSEK: One was forwarded to me from
4 Ms. Flannigan, which is how I determined it was an
5 iCloud account. I have an iCloud-- something on my
6 phone. I've looked in it. I didn't receive those
7 e-mails from them, I don't know why. But I don't use
8 that e-mail, so...

9 MS. BRANNON: And just to be clear, was it
10 your understanding from Ms. Tomasic and from Ms.
11 Flannigan that they intended to view the video and to
12 look for a particular document that you were handing a
13 client?

14 MS. ROKUSEK: By-- if by "they" you mean an
15 agent working for them, yes, their case agent.

16 MS. BRANNON: Their case agent. And to look
17 for a specific action on your part in handing a document
18 to your client?

19 MS. ROKUSEK: Correct.

20 MS. BRANNON: Do you have any information
21 that the videos that were made available to you were
22 limited to defendants either in this case or in a
23 related case?

24 MS. ROKUSEK: I have no idea who they were
25 made available to.

1 MS. BRANNON: When you were able to open up
2 the video, was there-- I think you mentioned, but
3 there's a further index of dates once you go into the
4 video; is that right?

5 MS. ROKUSEK: Yes. And it-- it's not the
6 most user-friendly process. But once you open it,
7 because-- and without Mr. Bussell, I may have never
8 found it myself. But once you open it, you can look for
9 a date and a time that is close enough that you know
10 you're going to be present in the room and you can go to
11 it and wait until your client enters the room. But
12 there-- it's always being taped. So some of the rooms
13 are empty until someone enters them, or you can just
14 watch someone sitting there waiting for an attorney to
15 appear or waiting for a guard to take them out.

16 MS. BRANNON: Just to give context to these
17 logs, these visitation logs, what happens when you call
18 to ask to see a client at CCA?

19 MS. ROKUSEK: They note what date and time
20 you intend to meet with your client and then you check
21 in when you arrive, and they know that. And you check
22 out when you leave, and they know that.

23 MS. BRANNON: And was that the log that they
24 were comparing against the videos to determine which
25 ones were yours?

1 MS. ROKUSEK: That's the log we used.

2 MS. BRANNON: Okay.

3 MS. ROKUSEK: We brought our own log of my
4 visits that I obtained from CCA. It would've been very
5 easy for the case agent to do the same, because I was
6 told by the prosecutors that, in fact, they had already
7 pulled my logs to note when I had visited my client.

8 MS. BRANNON: All right. Thank you.

9 MS. BARNETT: Ms. Rokusek, when you said
10 that the case agent was looking for you handing a
11 document, you've mentioned that a prosecutor said that,
12 do you remember who specifically said that?

13 MS. ROKUSEK: Ms. Flannigan is the one that
14 told me that the agent was looking at the video.

15 MS. BARNETT: And with regard to the videos,
16 I believe that you indicated or said that you had opened
17 up two of them, one with you and your client, and then
18 one where another person was sitting there; is that
19 correct?

20 MS. ROKUSEK: We actually opened up more
21 than two at a time. You can open up I think 16 at a
22 time and drag and drop into the windows to watch more
23 than one room at a time. So we actually opened up more,
24 because we had a very limited amount of time before we
25 were going to have to leave the building. It was Friday

1 afternoon and it was nearing 5:00. So we were able to
2 watch visits with one of-- one of my clients.

3 And the reason that happened is because when
4 we pulled the log, we actually visited another client
5 prior to meeting with the client in question. So when
6 you go up there, they may have somebody else in place
7 first if you're meeting with more than one client. So I
8 met with that client first. And so when we opened up
9 that date and time, he was the person in the room.

10 When we opened up the next one, my other
11 client was in the room waiting for us. And then we--
12 when we finished the first visit, we were moved to a
13 different room and he was moved to meet with us.
14 Inadvertently, in going back we hit a wrong date and
15 opened up a different room with somebody else's client
16 sitting in there. So I could've opened up any window of
17 any room from the dates in question and watched anyone's
18 attorney-client meetings had we chosen to do so.

19 MS. BARNETT: But with regard to the ones
20 that you opened up, there was no audio associated with
21 them. Correct?

22 MS. ROKUSEK: Not that we were able to--
23 there is an audio button. When we clicked on it,
24 nothing happened.

25 MS. BARNETT: And did you click on it with

1 regard to your clients?

2 MS. ROKUSEK: Yes.

3 MS. BARNETT: You didn't click on it with
4 regard to anybody else's clients?

5 MS. ROKUSEK: We didn't even watch the
6 videos regarding anyone else's clients once we figured
7 out it wasn't a client of mine.

8 MS. BARNETT: Now, when Judge Robinson had
9 asked you earlier in your testimony about the case agent
10 and reviewing the videos, you had mentioned that you
11 were told that the case agent saw you walking down a
12 hall. Who said that to you?

13 MS. ROKUSEK: I believe-- I believe, and
14 don't quote me, but I believe it was Ms. Flannigan as
15 well. If not, it was Ms. Tomasic. But I believe it was
16 Ms. Flannigan.

17 MS. BARNETT: But there was no indication
18 that your client was with you as you were walking down
19 the hall. Correct?

20 MS. ROKUSEK: Well, typically your client
21 wouldn't be with you walking down the hall.

22 MS. BARNETT: Okay. You don't--

23 MS. ROKUSEK: They don't let us walk our
24 clients around, so no.

25 MS. BARNETT: You don't meet with your

1 clients in the hallways at CCA, do you?

2 MS. ROKUSEK: I do not. But I meet with
3 them in rooms where I was videotaped.

4 MS. BARNETT: Okay. Thank you. I have no
5 further questions, Your Honor. Thank you.

6 THE COURT: Thank you, Ms. Rokusek.

7 MS. ROKUSEK: Thank you.

8 MS. BRANNON: Your Honor, we also have Mr.
9 Bussell here, and we have an affidavit in evidence from
10 him. I don't know that there's any need to call him to
11 testify. We asked him to be here because I think, as
12 Ms. Rokusek indicated, he is the one that is more-- can
13 manipulate the videotape that they saw and can show how
14 it zooms and so forth. So we wanted him to be available
15 when the Court wants to review that with the two of
16 them. I don't know if the Court wants to do that and--
17 take a break and do that now or wait until the end of
18 the hearing, but that's why we wanted him to be
19 available.

20 THE COURT: Okay. How-- how much-- how much
21 longer a hearing are you anticipating with your other
22 evidence?

23 MS. BRANNON: Judge, we have a custodian
24 from-- of records from CCA, which I think will be very
25 short. We have two witnesses by Skype. And then Mr.

1 Ney is present here. So we think cumulatively that
2 testimony would take about an hour, hour and 15 minutes.

3 THE COURT: All right. Why don't we go for
4 say another 20 minutes, we'll take a break. I'm
5 inclined to look at those at the end, unless Mr. Bussell
6 needs to leave for some purpose.

7 MS. BRANNON: All right.

8 THE COURT: Okay.

9 MICHELLE JENSEN-SCHUBERT,
10 called as a witness on behalf of the Defendant, having
11 been first duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MS. BRANNON:

14 Q. Please state your name for the record.

15 A. Michelle Jensen-Schubert.

16 Q. And what do you do for a living?

17 A. I work at CCA. I'm the inmate records clerk.

18 Q. Did you receive a subpoena from us?

19 A. Yes, yesterday.

20 Q. Okay. And on that subpoena, what records did you
21 gather together to bring to us today?

22 A. I gathered three individual files that I copied.

23 Q. Uh-huh.

24 A. And then I also received some of our policies
25 that you requested.

1 Q. Why was it that you gathered those particular
2 inmate files?

3 A. Because normally when I receive a subpoena, it is
4 for inmate records' files.

5 Q. All right. And you understood from our subpoena
6 we were looking for subpoenas or records requests from
7 the government; is that right?

8 A. I was unclear on that.

9 Q. Okay. If you receive a subpoena related
10 specifically to an inmate at CCA, what do you do with
11 that subpoena?

12 A. I store it in their file. Or if I get it
13 electronically through e-mail, I have a folder in my
14 e-mail that I put it to.

15 Q. So it would be a-- in both possibly?

16 A. Correct.

17 Q. Did you look through-- well, first of all, can
18 you say the names of the inmates on those files?

19 A. Ms. Rowlette. I can't think. Mr. Bishop and--

20 Q. Mr. Black?

21 A. Yes.

22 Q. All right. Did you look through those inmate
23 files for us today?

24 A. Yes.

25 Q. Did you find any subpoenas--

1 A. No.

2 Q. -- anywhere in their inmate files?

3 A. No.

4 Q. All right. If a subpoena or a records request is
5 received by CCA that is not particular to an inmate, do
6 you know what happens to it?

7 A. It goes to whoever it needs to go to. If it's
8 for video, it would go to that person.

9 Q. There's no central repository at CCA that you
10 know of--

11 A. No.

12 Q. -- that all records requests go to?

13 A. No.

14 Q. All right. Would you ever provide records or
15 video or anything else just upon request?

16 A. No.

17 Q. Would there be an exception for the marshal's
18 office?

19 A. Yes.

20 Q. And what is that exception?

21 A. Because we have a contract with the marshals and
22 that is their property.

23 Q. All right. Do you know-- well, you've heard the
24 testimony here about video. Do you know how that was
25 provided to the U.S. Attorney's Office?

1 A. I do not.

2 Q. You had no involvement in that at all?

3 A. No.

4 MS. BRANNON: Okay. Thank you very much.

5 We have no further questions.

6 MS. BARNETT: Nothing else, Your Honor.

7 Thank you.

8 THE COURT: All right. You can step down.

9 MS. BRANNON: Your Honor, in looking at the
10 exhibits that have been admitted before the Court, 438
11 is a grand jury subpoena which is, in fact, the subpoena
12 that led these videos to be provided to the U.S.
13 Attorney's Office. It's-- was I believe issued three
14 days after the complaint was filed in this case and
15 spans, as we mentioned, from July to-- of last year to I
16 believe April of this year.

17 THE COURT: So it's for-- this says July,
18 2014 through April 12, 2016.

19 MS. BRANNON: I misspoke, that's right.

20 THE COURT: All video footage or still
21 images currently retained by the CCA depicting any
22 internal or external surveillance video or still image
23 taken between those dates at the CCA facility in
24 Leavenworth, Kansas.

25 Do you know what-- how they distinguish -

1 maybe I should've asked this witness - internal and
2 external surveillance, or is somebody going to testify
3 to that?

4 MS. BRANNON: I don't know that someone is
5 going to testify. I can say that there are yards
6 outside of CCA where they go for exercise and other
7 things, and I assume that's what external is.

8 Also, when you get to CCA, if you're a legal
9 visitor, you-- and I don't know if the Court has been
10 there, but there is one gate that you go through first.
11 They open that and close it behind you. There's a
12 second gate that you go through, they open and close
13 that. And then you go into the lobby. I believe there
14 are cameras out at that area, the gate area, that would
15 record who's going in or out.

16 Those are the external cameras that I would
17 contemplate. But no, we don't have any specific
18 testimony as to that. I'm sure we could get it for the
19 Court.

20 THE COURT: Okay. That's fine.

21 MS. BRANNON: The other thing on the exhibit
22 list relevant to this last witness is 436, which are the
23 CCA policies that were produced by the 17(c) subpoena.
24 I think those policies-- we're not going to go through
25 those line-by-line here today, Your Honor, but I think

1 those policies address when recordings of attorney
2 visitation, attorney-client visitation rooms can be
3 made, who was authorized to make them, when they can
4 make audio-recordings I believe is in there as well.

5 THE COURT: Okay.

6 MS. BRANNON: Your Honor, next we'll call
7 Richard Ney to testify, please.

8 RICHARD NEY,
9 called as a witness on behalf of the Defendant, having
10 first been duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MS. BRANNON:

13 Q. Would you state your name for the record, please.

14 A. Richard Ney, N-E-Y.

15 Q. And, Mr. Ney, what do you do for a living?

16 A. I'm an attorney in private practice in Wichita,
17 Kansas.

18 Q. Can you describe the nature of your practice?

19 A. It's criminal defense.

20 Q. And in-- how long have you been practicing?

21 A. Practicing law, 38 years.

22 Q. Can you give a quick overview of what you've done
23 in those 38 years?

24 A. Certainly. I was a first assistant and then
25 chief public defender in Vermillion County, Illinois. I

1 worked briefly with the Vermont Defender General's
2 Office. I established and ran the Public Defender's
3 Office in Wichita for eight years. I was then appointed
4 chief federal public defender for the District of
5 Hawaii. Two years later we added Guam to that. So I
6 was chief federal defender for Hawaii and Guam for three
7 years. And then in the last 20 years, I've been in
8 private practice in Wichita. And I should say for six
9 years I served as a federal resource counsel with the
10 Death Penalty Project.

11 Q. Have you heard the testimony presented here
12 today?

13 A. I have.

14 Q. Have you reviewed the pleadings that have been
15 filed in this matter?

16 A. I have done so.

17 Q. All right. Let's talk a little bit about what
18 you've done in your experience in visiting with clients.
19 Have you ever been to CCA?

20 A. I have not.

21 Q. Okay. Have you been to other facilities to visit
22 your clients in custody?

23 A. Very many, yes.

24 Q. In those facilities, describe what your
25 understanding or expectation was regarding your legal

1 visitation with your client.

2 A. Certainly. In the various prisons and jails that
3 I visited, there is rarely cameras.

4 Q. Uh-huh.

5 A. I-- I certainly look for that when I meet with a
6 client. If there are cameras, I find out very quickly
7 whether those are just for safety monitoring or they're
8 there for recording.

9 Q. What's the difference to you there?

10 A. A great difference. There's a difference between
11 a guard occasionally looking in to see that everything
12 is going all right in a visitation and there's no harm
13 to either individual, as opposed to a recording of my
14 visitation with a client, which is in my belief
15 privileged. And it could be kept and used by
16 prosecutors or-- or agents at a later time.

17 Q. Have you in your experience had to take steps to
18 ensure that there was not recording going on in
19 attorney-client visitation?

20 A. Yes.

21 Q. And what was that?

22 A. Well, it-- I have, for example, when responding
23 to a jail situation where my client is being interviewed
24 and I've asked-- been asked to come in, obviously I
25 believe that those rooms are monitored, I ask to be

1 removed to another room so I can consult with my client,
2 as opposed to where the interview was taking place.

3 In various situations I've asked jails if
4 recordings are going on, to be assured they're not.

5 When I was federal defender in Hawaii, we had an
6 interesting situation that many of our clients-- because
7 there was no federal detention center in Hawaii, many of
8 our federal clients were on the mainland in Alameda
9 County. We set up a closed-circuit situation where we
10 could talk to the client, this was back in 1991 through
11 '96, we could talk to the client through closed-circuit
12 in California. This was through the GSA. And we took
13 many steps to make sure that these communications were
14 not recorded, could not be monitored on either end.

15 Q. You heard Ms. Rokusek describe her situation.
16 Has anything like that ever happened to you?

17 A. No, it has not. I have never found that I have
18 been recorded when I visited a client.

19 Q. Not only not recorded, but have you ever had an
20 experience of a U.S. Attorney having access to
21 attorney-client communication?

22 A. Of that sort-- of that sort, no. I certainly had
23 situations where prosecutors got privileged material
24 that I've litigated, but not of this sort.

25 Q. What exactly-- well, let's talk about this aspect

1 of it. The evidence is that right now we know there are
2 video-recordings, but we're not sure about audio. If it
3 were such that these recordings were limited to video,
4 is that still a problem?

5 A. It's a huge problem as far as I'm concerned.

6 Q. How so?

7 A. Well, the video as been described by counsel is
8 pretty good quality, it's--

9 Q. Uh-huh.

10 A. You can zoom in on it. What would stop anybody
11 from hiring a lip reader or, if they have that capacity
12 themselves, reading the lips of the individuals and
13 gaining the information that was passed from lawyer to
14 client. Certainly, and it's not just the government, if
15 co-counsel-- or if a co-defendant's counsel are
16 receiving these videos, would they not be obligated to
17 try and learn what is on them?

18 I'm defense counsel and I see a video of someone
19 who's an informant against my client, wouldn't I love to
20 know what's going on there and don't I have an
21 obligation, if I can reasonably find out what that
22 individual is saying, to find out. A lip reader would
23 do that. I mean, and that's not far-fetched.

24 I'm a baseball fan and every time the catcher
25 goes to the mound, the pitcher and catcher cover their

1 mouths with their gloves. Why? Because television is
2 there and their conversation could be found.

3 But there's a number of other problems as well.
4 Let's suppose I'm doing a-- there's a non-verbal
5 communication. If I'm doing a self-defense case, let's
6 say, and my client is showing me how the assault took
7 place, are we talking about that and acting it out,
8 that's certainly something that a prosecutor would have
9 access to and I-- and I assume would love to have.

10 Again, the quality here, as been described, you
11 could see the documents both counsel and his client are
12 reviewing. I've been in a number of trials where
13 prosecutors ask the defendant, "Look, you went over
14 material with your attorney, did you not? Did you not
15 see the photographs," et cetera. Certainly that would
16 be fodder for that, and fodder for impeachment if the
17 client said no. They'd say, "Well, let's go to the
18 videotape and look."

19 There's a number of-- even relationships between
20 attorneys and clients. I mean, you can watch a
21 videotape of someone and understand whether they're
22 having a good conversation or an unpleasant
23 conversation. A prosecutor would have the ability to
24 see if my client and I are getting along or not getting
25 along.

1 Competency issues. If I raise an issue that my
2 client is incompetent to stand trial, let's go to the
3 videotape. Look, he's talking with you, he's doing
4 this. Again, which would go into the issue and a
5 violation of the lawyer/client privilege in-- in my
6 belief.

7 Q. Same thing perhaps with whether the client is
8 literate or not?

9 A. Certainly. Or speaks English. Again, if-- to
10 show the attorney-client communication, just not the--
11 the content of it, but the quality of it. And in
12 post-conviction obviously, you could-- only the
13 imagination would stop at how that could be used in a
14 2254 or 2255 proceeding.

15 Q. Who else do you consider to be a member of the
16 legal team that is within this privileged, confidential
17 communication with a client?

18 A. Well, certainly investigators. In capital cases,
19 mitigation specialists, anybody who's working for the
20 defense, experts in certain situations. In capital
21 cases, many times I will be on a team and we hire an
22 expert who is only an advisory expert, like mental
23 health expert, not to testify but to give us advice.
24 That person would certainly be a part of the team.
25 Paralegals, the list goes on and on.

1 Q. Let's talk about experts for just a minute,
2 because there are all sorts of experts. But based on
3 this, for example, a psychological expert, there's
4 psychological testing that goes on between the expert
5 and the client. Right?

6 A. Certainly.

7 Q. And that includes things on paper and things that
8 they're presented to look at?

9 A. Not just on paper.

10 Q. Uh-huh.

11 A. A couple of the experts I use use laptop
12 computers, have permission to take those in. And
13 certainly those screens would be visible to these
14 cameras, or at least it seems like they would.

15 Q. There are also psychological tests that require a
16 client to either handle something or look at photographs
17 and respond; is that right?

18 A. Right.

19 Q. Okay. When-- in your experience, whether we're
20 in state or federal, capital or not, when we ask to have
21 an expert meet with a client, do we do that ex-parte?

22 A. We do.

23 Q. And if the U.S. Attorney was made privy to a
24 visit with a particular expert that had been ex-parte,
25 are there times that they could identify what kind of

1 expert it was?

2 A. Not only identify the expert, identify the tests
3 that were being done, even have their own expert review
4 the testing. As you said, there's manipulative testing
5 that can be seen in how a client would do that.

6 I recently had a case in-- it was a state court
7 case out of Johnson County, my expert was going to be
8 placed in a room with cameras.

9 Q. Uh-huh.

10 A. And we specifically made an arrangement that that
11 not be done for these reasons.

12 Q. Let's talk about what obligations one would have
13 if they-- if you inadvertently came into what you could
14 identify as privileged material.

15 A. Yes.

16 Q. What are the obligations of an attorney?

17 A. I've litigated this issue and it's-- I think the
18 law is clear that if I were-- as a defense attorney or
19 prosecutor, if I have something in our hands that we
20 should not have, our obligation is to-- immediately to
21 alert the other side and the Court. To hold onto that
22 information, to use that information in any way I think
23 is a violation of ethics and - and certainly by a
24 prosecutor - violates the client's Sixth Amendment right
25 to private consultation with his attorney.

1 Q. There are times, in fact, that a prosecutor may
2 have reason to have access to privileged or confidential
3 information, at least under the law. The law might
4 recognize that; is that right?

5 A. There are limited times, yes.

6 Q. What's your experience with that?

7 A. Well, one of the things is the SAMs.

8 Q. Can you say what SAMs is?

9 A. Sure. Special administrative management. In
10 1995 I think the first SAMs Act was passed. It was
11 beefed up after 2001. I haven't personally tried cases,
12 but I've been involved with trial teams as federal death
13 penalty resource counsel in teams that have had SAMs
14 restrictions.

15 SAMs can be a whole range of things. But Part D
16 of the SAMs regulation allows certain intrusion into the
17 attorney-client process. It can be such as limiting who
18 can see the client, that investigators cannot come in
19 for some reason, or paralegals. It can also extend to
20 attorneys.

21 The most extreme cases where there are terrorist
22 suspects, attorneys' conversation with the clients can
23 be monitored. But that requires an act by the Attorney
24 General. A prosecutor, a line prosecutor or a U.S.
25 Attorney cannot do it. The Attorney General has to

1 issue that order and, more importantly, the counsel
2 involved has to be informed. And that can be litigated
3 before the Court. I've been privy to several cases
4 where there's been litigation on SAMs regulations.

5 Q. Uh-huh.

6 A. Or SAM impositions before the Court.

7 Q. Let's talk for a moment about phone calls that
8 hasn't been brought up so much here. But if the
9 government were to have access and listen to recorded
10 attorney-client phone calls, what is the significance of
11 that to you?

12 A. Well, it's tremendously significant. Phone calls
13 between attorney and client have traditionally been held
14 to be privileged. There's a great import for attorneys
15 to make sure their clients are talking with them on a
16 secure line. I think-- I think that's required. For--
17 for the government to have those calls under-- except in
18 the most exceptional circumstances unless, for example,
19 I and my client are plotting a crime, that may do away
20 with the exception. But beyond that, I-- I cannot see a
21 difference.

22 Because, understand, we're talking about people
23 that can't come to my office, that I can't have a
24 conversation with in privacy that I've arranged. It has
25 to be through a telephone, which is run by the-- the

1 government or the-- the correctional facility, or in a
2 visitation room. Again, run by the correctional
3 facility. And we, as attorneys, rely on those to be
4 private. We can't have them brought to our office to
5 make sure of that.

6 Q. So in our situation right now where we know that
7 CCA has or is recording our meetings with our-- our
8 clients, what is our obligation as their attorney? Can
9 we meet with them in that situation?

10 A. Well, I mean, it really proposes a dilemma. Do
11 you not meet with your client or do you meet with them?
12 I think that first you have to litigate that issue. But
13 secondly, if I were talking to my client in CCA today,
14 I'd file an objection. And then when I'm talking to my
15 client, he and I would be holding this in front of our
16 face when we talked.

17 Q. Would you have an obligation to tell the client
18 that it was no longer confidential or privileged?

19 A. Absolutely. And certainly having a file in front
20 of your face while you talk to your client and for him
21 to have a file in front of his face certainly I think
22 harms the lawyer/client relationship.

23 Q. Just to be clear; from what you know in this
24 case, the recording by CCA of the meetings between the
25 legal team and a client is a violation of the

1 confidentiality and privilege that is expected of that
2 communication?

3 A. In my year-- 38 years of practice and running
4 offices and dealing with public defenders and defense
5 counsel, I believe absolutely it is. Even if there is
6 no sound, as I said, there's nothing that-- the
7 non-verbal statements and then the ability to read lips
8 certainly violate that privilege to an incredible
9 extent.

10 Q. Again, limiting this to the video without
11 audio-recording of these meetings and the production of
12 that to the U.S. Attorney's Office, can you talk about
13 the constitutional implications?

14 A. I-- yes. I-- I think it violates the Sixth
15 Amendment. There are a number of cases-- in fact, I'm
16 litigating a case before the Kansas Supreme Court right
17 now on a violation, not this, but the prosecutor coming
18 into possession of a defense investigator's notes. I'm
19 litigating that now as a violation of the Sixth
20 Amendment. It-- when that came to our-- light in the
21 Douglas County case, we moved to have the prosecutor
22 recused. The judge refused. But that is an issue on
23 the appeal of that case.

24 I don't think there can be a more important issue
25 than a prosecutor interfering with the confidential

1 relationship, attorney and client.

2 Q. Let's talk for a moment about the effect on the
3 client who has expected the confidentiality and
4 privilege of this communication and that has been
5 stripped away. Can you talk about the attorney-client
6 relationship and how that might be affected?

7 A. I can. There is no question that if I've told my
8 client, you know, "What you say to me is privileged, you
9 know, it's between you and I." And then, "Oh, sorry. I
10 just found out everything we have done here has been
11 recorded," at least on a video-recording, I mean, that's
12 a great breach of faith.

13 But even entering a relationship and saying,
14 "Everything we say is going to be recorded by these
15 cameras, you know, hold your hand over your mouth or
16 hold something over your mouth," that is not the way for
17 ideal client relationships. Obviously appointed
18 attorneys, public defenders, and retained counsel even,
19 have a difficult road to hoe here to gain a client's
20 confidence. In this kind of-- you know, in serious
21 cases, in capital cases, to put this barrier in between
22 the lawyer and client I think is a disaster.

23 Q. Can you think of any other particular problems
24 that would attend the situation that is before us?

25 A. Well, again, the-- the ability for the

1 information, especially co-counsel-- or co-defendants'
2 counsel, excuse me, to get this information I think is a
3 huge problem. Even if the prosecutor says, "Well, I'm
4 not, you know, going to have lips read," again, what
5 is-- what is the duty on me as-- as another defendant's
6 counsel to do it if I know there's important information
7 there just staring me in the face? I think that's a
8 huge issue.

9 But I think we're-- it's a point where we're
10 going down this slope. If-- if the attorney-client
11 room, the one place in the world I can meet with a
12 client, is not secure from government intrusion and
13 recording, then what does attorney-client privilege
14 mean? It's a slope. Then why-- then why not the phone
15 calls and why not anything else and why can't they be
16 recorded? I mean, it's stunning to me, if you think
17 about it. Even under SAMs restrictions, even in
18 Guantanamo, I know lawyers have represented people in
19 Guantanamo, they're not being recorded. They may be
20 being monitored by outside individuals, but recordings
21 aren't being made.

22 MS. BRANNON: If I could have just one
23 moment, Your Honor. Thank you, Mr. Ney.

24 THE COURT: Any questions?

25 MS. BARNETT: Yes, Your Honor.

1 THE COURT: All right. I-- I had one
2 question.

3 THE WITNESS: Yes, Your Honor.

4 THE COURT: You talked about-- and I know
5 you're not familiar with CCA. But just as a general
6 proposition, when you have experts go see your clients
7 there in custody, that would include polygraphers.
8 Correct?

9 THE WITNESS: It would.

10 THE COURT: And so are those the rooms that
11 polygraphers use if you want to have your client
12 polygraphed?

13 THE WITNESS: I'm assuming. But again, what
14 I have done-- I have made sure whenever I've sent an
15 expert or anyone in that it's in a private setting, that
16 there is not either audio or video-recording, yes.

17 THE COURT: All right. Ms. Barnett.

18 MS. BARNETT: Thank you, Your Honor.

19 CROSS EXAMINATION

20 BY MS. BARNETT:

21 Q. Good afternoon, Mr. Ney.

22 A. Ms. Barnett.

23 Q. You had started out with your testimony talking
24 about how, and I think you've kind of ended it here on
25 the same note, that if you go into a facility, you're

1 paying attention as to whether or not there are cameras
2 or there's some type of monitoring device in the room.
3 Correct?

4 A. I am.

5 Q. And if you see something that you think might
6 indicate that somebody could be listening or could be
7 watching what you or your client are doing or saying in
8 that room, you make an inquiry, don't you?

9 A. I probably would. In this case, obviously if I
10 had looked at the website, apparently the website says
11 I'm not being recorded. If I had asked even their
12 security people, I would've been told no. But yes, if I
13 have questions, I do inquire.

14 Q. So if you go in and you see these big, you know,
15 I'm going to call it a bubble, a partial bubble in the
16 middle of the room or even up in the corner like that
17 over there, a camera, you're going to ask about it.
18 Correct?

19 A. That's always been my policy. I've been in jails
20 across the country with federal capital defendants and I
21 always ask starting out if I see a camera, "Tell me
22 about this." But I rely on what is being told to me,
23 too.

24 Q. Likewise, if I were to tell you that at CCA there
25 are, in fact, two interview rooms where there are no

1 cameras, there's no monitoring, there's no videotaping
2 or recording of any sort, if you were aware of that,
3 would you have asked to meet with your clients in those
4 rooms?

5 A. If I were given the choice of, yes, you're going
6 to be recorded here and not here, I guess I wouldn't
7 understand why there's a difference, but yes, I would.

8 Q. Okay. So that is something that you pay
9 attention to when you're meeting with your clients or in
10 custody?

11 A. I do. But certainly like every other-- once I
12 understand what's going on or not-- supposedly not going
13 on, I rely on that for the foreseeable future.

14 Q. Now, during your testimony you also talked about
15 the video that's been described by counsel. Were you
16 referring to Ms. Rokusek's testimony earlier?

17 A. I was.

18 Q. Have you had any other descriptions of what might
19 be on these DVRs or these videos given to you by anyone
20 else?

21 A. Just what was in the pleadings and what I heard
22 in court today.

23 Q. So you haven't actually seen them yourself?

24 A. I have not.

25 Q. And so when you talk about what might be on them,

1 it's really just based on what you've heard, it's not
2 based on anything you've seen at all. Correct?

3 A. That's correct.

4 Q. And so then you went on in your testimony, you
5 talked about that there are a number of problems
6 associated with watching an attorney-client interview or
7 encounter, meaning the non-verbal communication, the
8 material going over, the relationship. Do you kind of
9 recall that line of testimony?

10 A. I do.

11 Q. You don't know if any of that type of
12 communication is contained on these recordings, do you?

13 A. I don't. But over a space of time with hundreds
14 of attorneys, I assume there are situations like that.
15 But I have not seen the recordings, no.

16 Q. And even with regard to the space in time and
17 hundreds of attorney, you don't even know how many
18 attorneys or their clients and their meetings are
19 actually contained on these videos, do you?

20 A. I do not. But one is one too many, in my
21 opinion.

22 Q. Well, so it would be important then, if such
23 evidence came to light, to hand that evidence over to a
24 special master, an independent third party, to review it
25 and determine exactly what's on it, wouldn't it?

1 A. I would say no. I think if a prosecutor, in my
2 opinion, sees that, they raise their hands and say, "Oh,
3 my," and tells counsel and the Court and gets rid of it
4 immediately. I-- again, I-- I can't see, especially if
5 it's not a security issue, I can't see the import of
6 that information unless it's to be used against the
7 defendant in some way, as it-- as it apparently was
8 here.

9 Q. Well, you have no evidence that it was used
10 against a defense attorney or defendant, do you?

11 A. Just counsel's testimony that it was used to
12 attempt to get her off the case.

13 Q. Counsel's testimony was that a case agent had
14 seen her walking in a hallway. Do you recall hearing
15 that?

16 A. Well, yes. I-- I do recall hearing that.

17 Q. Okay. Now, going to when you were talking about
18 experts and visiting in a facility with a client, a
19 hypothetical client and the use of a laptop. Screens
20 would be visible you said. But without seeing actually
21 where the cameras are at in these rooms or what's
22 contained on the videotape, you don't know whether or
23 not there were any laptops that were presented, whether
24 there were any screens that were seen or anything of
25 that nature, do you?

1 A. No, I don't.

2 Q. And with regard to the psychological examinations
3 or the polygraph examination, as the judge has recently
4 asked you about, you again don't know whether any of
5 those types of contacts are contained on these
6 videotapes, do you?

7 A. I don't. But over the years, I assume that
8 happened. I can only assume.

9 Q. And it would be just an assumption, wouldn't it,
10 Mr. Ney?

11 A. It would.

12 MS. BARNETT: May I have just a moment,
13 please, Your Honor?

14 THE COURT: Yes.

15 MS. BARNETT: I have nothing else. Thank
16 you, Mr. Ney.

17 THE WITNESS: Thank you.

18 REDIRECT EXAMINATION

19 BY MS. BRANNON:

20 Q. Mr. Ney, if a jail tells you those
21 attorney-client visitations are not recorded, do you
22 rely on that?

23 A. Of course. I-- I have to, because I assume
24 they're telling me the truth. I cannot do an
25 independent investigation unless I litigate the issue.

1 Q. And referring to Defendant's Exhibit 435, if that
2 jail publicly says that attorney-client visitations are
3 confidential, do you rely on that?

4 A. I rely on it, one, because they've told me, and
5 two, because I believe-- I guess I would believe that no
6 jail is going to record attorney-client conversations.

7 Q. And referring to Defendant's Exhibit No. 443, if
8 the U.S. Marshal tells you that these are not recorded,
9 would you rely on that?

10 A. I would rely on that.

11 Q. And referring to the same exhibit. If the U.S.
12 Attorney's Office tells you that it's not recorded,
13 would you rely on that?

14 A. Absolutely. Because my experience is I have
15 never been in a institution which tells me that they're
16 going to record my visit with my client. So certainly
17 I'd rely on that being the case.

18 Q. So if you have the institution telling you
19 directly it's not recorded, if they publicly say it's
20 not recorded, if the U.S. Marshal says it's not
21 recorded, and the U.S. Attorney's Office says in writing
22 it is not recorded, do you feel that you have any
23 obligation to research further or question further, or
24 are you going to rely on what-- those four sources?

25 A. No. 1, I'm going to rely on it. And two, I'm

1 going to rely on it because it's stunning to me it ever
2 would be recorded. It just hasn't been my experience in
3 over 38 years that attorney-client meetings are
4 recorded. I mean, the opposite is true.

5 I have-- in a police interrogation setting, I
6 certainly have my antenna up and I move the
7 interrogation-- the conference. But in a prison or a
8 jail, interview rooms specifically set aside for
9 attorneys, I have no belief that there's a recording
10 device going, unless I'm told otherwise.

11 Q. And so if the jail-- if the jail says it's not
12 recorded, if they publicly say it's not recorded, if the
13 U.S. Marshal is telling you it's not recorded, and the
14 U.S. Attorney is telling you it's not recorded, would
15 you have any reason to think that the U.S. Attorney
16 would have recordings of your meetings with your client?

17 A. No reason--

18 MS. BARNETT: Objection, asked and answered,
19 Your Honor.

20 THE COURT: I think it's a different
21 question.

22 A. No reason at all.

23 MS. BRANNON: Thank you.

24 THE COURT: All right. Anything more?

25 MS. BARNETT: No, Your Honor.

1 THE COURT: All right. Mr. Ney, you can be
2 excused.

3 THE WITNESS: Thank you, Your Honor.

4 THE COURT: Let's take a break until 3:30.
5 And I think you said you have a couple more witnesses by
6 Skype?

7 MS. BRANNON: Yes, Your Honor, if I can. We
8 have two witnesses by Skype. There's one other matter
9 the Court brought up. I would like to say that if
10 there's a polygrapher, those meetings do happen in the
11 rooms, there are no place else for those meetings to
12 take place. If we bring a polygrapher, it is in those
13 attorney-client rooms. Further, we understand-- we
14 haven't done this, but sometimes there are debriefings
15 by police officers at CCA, and we believe those are
16 conducted in those rooms as well. And we--

17 THE COURT: Debriefings of cooperators?

18 MS. BRANNON: Yes. We just wanted to put
19 that on the record as well.

20 THE COURT: All right. I understand. All
21 right. We'll be in recess until 3:30.

22 (Recess).

23 THE COURT: All right. You can be seated.
24 All right. Ms. Brannon, Mr. Redmond.

25 MR. REDMOND: Thank you, Your Honor. We'd

1 call Randy Rathbun. It's over a Skype connection. If
2 there's any problems with the sound, just let me know.

3 QUESTIONING OF MR. RANDY RATHBUN

4 MR. REDMOND: All right. Mr. Rathbun, are
5 you there?

6 MR. RATHBUN: Yeah.

7 MR. REDMOND: Can you-- can you hear us?

8 MR. RATHBUN: I can. Can you hear me?

9 MR. REDMOND: Yes, sir. There's a lot of
10 folks in this room. Can you familiarize us with your
11 professional history?

12 MR. RATHBUN: I graduated law school in '78.
13 Went to work for Curfman, Brainerd, Harris, Bell,
14 Weigand & Depew. Worked for them for two years, which I
15 did mostly-- I did not-- there's 22 members in that firm
16 and nobody wanted to do appointment work, and there was
17 no public defender at that point. So I did everybody's
18 criminal appointments. So I did mostly defense work for
19 the first-- criminal defense work for the first couple
20 of years.

21 And then I left with a couple of partners
22 and practiced with Depew & Gillen, which became Depew,
23 Gillen & Rathburn, which is now Depew, Gillen, Rathbun &
24 McInteer ever since, except for three years in which I
25 was U.S. Attorney from August of '93 to January of '96.

1 MR. REDMOND: What courthouse were you based
2 out of?

3 MR. RATHBUN: Well, actually I was-- I live
4 in Wichita, so I spent most of the time in the Wichita
5 office, but I tried to get around to all of the offices.

6 MR. REDMOND: As part of your role as U.S.
7 Attorney, you had to become familiar with DOJ policy; is
8 that fair to say?

9 MR. RATHBUN: I did. I got to know the U.S.
10 Attorney's manual maybe better than I would like.

11 MR. REDMOND: And during that time, did any
12 of the training that you received and the materials that
13 you reviewed relate to protection of the attorney-client
14 privilege?

15 MR. RATHBUN: I don't know that I can say
16 that. I know that the U.S. Attorney's Office is-- is
17 very good about training U.S. Attorneys. So I'm certain
18 that we spent time on the Sixth Amendment. So I can't
19 imagine that I did not receive training on that. I was
20 also blessed to be on the Attorney General's Advisory
21 Committee, and we spent a lot of time talking about
22 those sorts of issues.

23 MR. REDMOND: Okay. And we won't go into
24 the specifics of that policy, but can you generally
25 describe the Department of Justice's attitude toward the

1 attorney-client privilege?

2 MR. RATHBUN: Well, you know, the-- the
3 thing that I always emphasize is our job is to make
4 certain that all the amendments to the Constitution are
5 enforced, including the Sixth Amendment. And I-- I felt
6 strongly about that and still do feel strongly about it.
7 And I'm-- so I certainly believe that that was just as
8 important as any of the other amendments that we had to
9 protect.

10 MR. REDMOND: Were you-- did you believe
11 yourself able to subpoena material that contained
12 material protected by the attorney-client privilege?

13 MR. RATHBUN: There's procedure to do that.
14 You have to go to the DAG. You have to make a showing
15 somehow that there's a conspiracy involving with the
16 attorney and-- but obviously I couldn't-- (reporter
17 interruption).

18 THE COURT: We're having trouble hearing,
19 including the court reporter, who's the most important
20 person. Can we plug it into a microphone?

21 COURTROOM DEPUTY: You have to have that--
22 the sound will come in our speakers, but it can't do it
23 over here, I just found out.

24 THE COURT: Just a minute, Mr. Rathbun.

25 (The technical issue was corrected).

1 MR. REDMOND: All right. Randy, can you say
2 something to test things for the court reporter?

3 MR. RATHBUN: Sure. Testing 1, 2. Check 1,
4 2.

5 MR. REDMOND: Is that better? Okay. Thank
6 you very much.

7 So if-- you said that you'd have to go to
8 the DAG. Can you explain what the DAG is?

9 MR. RATHBUN: The Deputy Attorney General.

10 MR. REDMOND: So the second in command for
11 the entire U.S. Department of Justice?

12 MR. RATHBUN: Yes.

13 MR. REDMOND: And that's whose permission
14 you would need to retain privileged information?

15 MR. RATHBUN: Yes.

16 MR. REDMOND: Okay. If you-- maybe you can
17 speak from experience here. If you accidentally came
18 into the possession of potentially privileged materials,
19 what would you do? Would that change the calculus? Do
20 you still have to go to the DAG?

21 MR. RATHBUN: You know, I-- I probably ought
22 to back up and say that I-- I had an open file discovery
23 policy. And I always thought that we needed to share,
24 and so that kind of maybe colors my opinion. But
25 certainly to the extent that if we ever came into-- into

1 access of attorney-client privileged information,
2 obviously we would've notified the Court.

3 The-- the closest thing I could think is
4 perhaps overheard conversations, I had a little bit of
5 experience with this, overheard conversations with
6 defense counsel. The U.S. Attorney's Office manual
7 requires you to notify the Court and obviously defense
8 counsel that you've overheard those conversations.

9 MR. REDMOND: Okay. And so-- and is that
10 true of all attorney-client privileged communications?
11 There's a duty to notify the Court if you come into
12 possession of them?

13 MR. RATHBUN: Certainly.

14 MR. REDMOND: Okay. What were-- what was
15 the detention facility in Wichita when you were U.S.
16 Attorney?

17 MR. RATHBUN: Oh. You realize that's 20
18 years ago. I think we had-- there was some people
19 detained in Harvey County, Sumner County, and over in El
20 Dorado.

21 MR. REDMOND: Okay. And in your knowledge,
22 did any of those facilities record the visits between
23 attorneys and their clients?

24 MR. RATHBUN: You know, I have to tell you,
25 I was never over there. But I certainly wouldn't have

1 had any idea that that was going on, and-- and I
2 would've taken a dim view of it.

3 MR. REDMOND: If you-- if there had been a
4 recording made of an attorney-client visit, you would've
5 notified the Court and talked to the DAG; is that fair
6 to say?

7 MR. RATHBUN: You know, it depends on-- I--
8 I don't have much background about what actually went on
9 here. I-- I made the unfortunate mistake of answering
10 my phone Saturday morning when Laura Shaneyfelt called,
11 and so I don't have a whole lot of background.

12 But based upon what I know of it in terms of
13 the camera would've allowed anybody to watch to
14 distinguish between Excel spreadsheets and pictures and
15 things like that, that would obviously concern me. And
16 it would concern me for a couple of reasons. It would
17 concern me for Sixth Amendment reasons. And I had
18 some-- I had some great assistants working, and I'd be
19 nervous about OPR problems. And so I would've been all
20 over that.

21 MR. REDMOND: Okay. And you have not been
22 able to be present for the testimony this afternoon, so
23 allow me to ask this question in a hypothetical form.

24 First, assume that there's a video that
25 shows an attorney meeting with a client. Okay? And

1 also that you can see the documents that are being
2 passed back and forth and that you can roughly identify
3 some of those documents as spreadsheets or photographs.
4 You can see how the client would react to some of those
5 documents being passed back and forth. Is that video,
6 in your opinion, covered by the attorney-client
7 privilege?

8 MR. RATHBUN: First, that never happened to
9 me. And secondly, if it had, I would've called the DAG
10 immediately because I'm afraid that that would be
11 attorney-client privilege, or at least close enough that
12 I would-- I would've been on the phone immediately with
13 the Deputy Attorney General.

14 MR. REDMOND: Just one moment, Your Honor.
15 Just to clarify the record on one point.
16 Could you explain what OPR is?

17 MR. RATHBUN: Office of Professional
18 Responsibility.

19 MR. REDMOND: All right. Mr. Rathbun,
20 that's all the questions that I have. Thank you very
21 much for making the time.

22 MR. RATHBUN: You bet.

23 THE COURT: All right. Any questions?

24 MS. BARNETT: Just very briefly, Your Honor.
25 Mr. Rathbun, you haven't seen any of the

1 videotaped materials that were obtained from CCA in this
2 case, have you?

3 MR. RATHBUN: I have not.

4 MS. BARNETT: You're not aware of what is
5 contained on any of those tapes, are you?

6 MR. RATHBUN: I have no idea.

7 MS. BARNETT: Thank you, sir. I have no
8 further questions, Your Honor.

9 MR. REDMOND: Nothing based on that, Your
10 Honor.

11 THE COURT: All right. Thank you, Mr.
12 Rathbun.

13 MR. REDMOND: Your Honor, we need to make
14 the next Skype linkup, it may take just a second.

15 THE COURT: Okay.

16 MR. REDMOND: If you don't mind, I would
17 like to move for the admission of the still photographs
18 that were shown during Mr. Thompson's testimony. The--
19 the exhibit lists them as Exhibits 401 to 403. If I
20 could approach.

21 THE COURT: Yes. Exhibits 401, 402, and 403
22 admitted.

23 MR. REDMOND: And inclusive up to--

24 THE COURT: Or no, I'm sorry, this is many
25 more than this. It's through 433?

1 MR. REDMOND: To 433, I'm sorry.

2 THE COURT: Okay. 401 through 433 admitted.

3 MR. REDMOND: Your Honor.

4 THE COURT: Yes.

5 MR. REDMOND: As much as everybody enjoys
6 testimony over Skype, this isn't working very well. We
7 propose that we proceed by telephone, if that's okay
8 with the Court.

9 THE COURT: Who is this?

10 MR. REDMOND: This is Professor Peter Joy
11 from the University of Washington in St. Louis.

12 THE COURT: All right. Is there any
13 objection to swearing him over the telephone call?

14 MS. BARNETT: No, Your Honor.

15 THE COURT: All right. It's Professor Joy?

16 MR. REDMOND: Professor Joy, yes, Your
17 Honor. His CV is Exhibit 448? 448.

18 THE COURT: All right. Proceed.

19 (A phone connection was established).

20 THE WITNESS: This is Peter Joy.

21 MR. REDMOND: Hi, Professor, this is Kirk
22 Redmond and a courtroom full of folks.

23 THE WITNESS: Yes.

24 MR. REDMOND: Professor, we are having
25 problems with the Skype linkup, would you be willing to

1 testify via telephone call?

2 THE WITNESS: Sure.

3 MR. REDMOND: Okay. Thank you very much.

4 You're going to be sworn in now.

5 PROFESSOR PETER JOY,

6 called as a witness on behalf of the Defendant, having

7 been first duly sworn, testified as follows:

8 DIRECT EXAMINATION

9 BY MR. REDMOND:

10 Q. Professor, could you spell your name for the
11 record and introduce yourself?

12 A. Yes. My name is Peter Joy. P-E-T-E-R. J-O-Y.
13 I'm a lawyer admitted to practice in the state of
14 Missouri and Ohio. I'm on inactive status in the
15 District of Columbia. I'm also a law professor and I
16 teach at Washington University in St. Louis.

17 Q. What do you teach, Professor?

18 A. Well, I teach a number of courses. I teach a
19 course called Legal Profession, which is the basic legal
20 ethics or professional responsibility course. I teach
21 Trial Practice and Procedure, and I also teach in a
22 criminal justice clinic, where I go to court with
23 students. We partner with the state public defender
24 office on matters in state court at the trial level.

25 I also have taught, but I haven't taught it now

1 in some years, a Comparative Legal Ethics seminar, which
2 looks at various legal ethics issues from a U.S.
3 perspective and then also from a perspective in other
4 countries.

5 Q. Do you read-- do you write on professional--
6 excuse me. Do you write on professional responsibility?

7 A. Yes, I do. Most of that writing is at the
8 intersection of legal ethics and criminal law or
9 criminal procedure.

10 Q. Okay. In your scholarship and from your
11 knowledge of the law, could you give the Court sort of a
12 working definition of the attorney-client privilege?

13 A. Attorney-client privilege is a communication
14 between attorneys and their clients or those working on
15 behalf of attorneys in-- someone that might be an agent
16 in order to obtain legal assistance. So the key things
17 are it's between these privileged persons, it's a
18 communication, sharing of information in order to obtain
19 legal assistance.

20 Q. So it's in service of the Sixth Amendment right
21 to counsel?

22 A. I'm sorry, I didn't quite hear you. Could you
23 speak a little bit louder?

24 Q. I certainly can. I was in the wrong place.

25 A. Oh, okay. Thank you.

1 Q. So the-- is there a relationship then between the
2 attorney-client privilege and the Sixth Amendment to the
3 federal constitution?

4 A. Yes, there is. I-- it's well-recognized that
5 attorneys, both criminal-- and I'll just focus on
6 criminal law here. That defense attorneys need to have
7 full disclosure of the facts to be able to be effective.
8 And so if you can't have confidential communications,
9 which would include attorney-client communications, it
10 would make it impossible to render effective assistance
11 of counsel, which would thereby be a denial of the Sixth
12 Amendment right to effective assistance of counsel.

13 Q. Is that true even if you're in jail waiting for
14 your trial?

15 A. Yes, it's absolutely true. Whether a person is
16 in jail or on bail, unable to meet in an attorney's
17 office, you need to be able to have confidential
18 meetings in order to adequately prepare a defense.

19 Q. Okay. Now, Professor, I'm not going to ask you
20 about any of the facts that have been developed here
21 today because you were not-- you were not able to be
22 present. So we're going to talk about these things in
23 sort of a hypothetical way.

24 What is the impact of recording simply visually
25 an attorney-client privilege on the-- I'm sorry,

1 recording a legal visitation on the attorney-client
2 privilege?

3 A. Well, it-- it intrudes on the meeting between the
4 client and the lawyer. And so it has an effect of
5 tampering down that full and frank discussion. It would
6 be, you know, an extra pair of eyes or several pairs of
7 eyes in observing what's going on. How the lawyer and
8 client are interacting to provide information that may
9 be-- possibly be useful for a prosecutor.

10 Q. You said usable to a prosecutor, but what if it's
11 only a visual recording?

12 A. Well-- well, I mean, lots of things can be
13 disclosed simply by a visual recording. So, for
14 example, you could have a defendant who is acting out
15 something, like pointing their finger as though they're
16 shooting a gun. And if there's a case involving a
17 shooting, that might be some indicia of-- of like how
18 something was done, almost like an admission, you know.
19 Or maybe putting their finger across their throat and if
20 there was somebody who had their throat cut. So the
21 acting out of things.

22 Also visual recordings sometimes, depending on
23 the camera angle and what-- what it shows, sometimes you
24 could actually make out words that are being spoken. Or
25 if there were papers being passed between the attorney

1 and the client or papers being reviewed between the
2 attorney and-- and the client, depending, again, on the
3 camera, it might show actually the written words. So it
4 would be revealing the communications that are going on
5 between the client and the attorney.

6 Q. Has the Kansas Supreme Court actually spoken to
7 this issue?

8 A. Yes, they have.

9 Q. Could you tell us about that case?

10 A. Well, it's a case that I was unfamiliar with
11 until I read the pleading that was filed in this matter,
12 but it's *Case versus Andrews*, it's a Kansas Supreme
13 Court case. And it's one that talked about the
14 intrusion, the visual surveillance on attorney-client
15 conferences. And there, the Supreme Court found that it
16 was not justified and that the state hadn't proved a
17 compelling state interest. And this was an unreasonable
18 interference that deprived the-- in that case the
19 petitioner, the criminal defendant, his Sixth Amendment
20 right to effective assistance of counsel.

21 Q. Had there been audio-recording in that case?

22 A. I don't believe that there was audio-recording in
23 that case at all.

24 Q. Professor, is there a difference between the
25 scope of the attorney-client privilege and a lawyer's

1 duty under the Rules of Professional Conduct to protect
2 confidential information?

3 A. Yes. There-- the duty of confidentiality, which
4 in Kansas is spelled out in Rule 1.6 of the Kansas Rules
5 of Professional Conduct, covers all information relating
6 to the representation of the client. And so that would
7 include everything that's covered by attorney-client
8 privilege, but it would also include everything else the
9 lawyer learns during the representation of the client.

10 And so that would be, for example, interviewing
11 witnesses or doing records research or anything that the
12 lawyer learns. And it also would cover things like the
13 temperament of the client. That's information that one
14 learns.

15 And so confidentiality is much broader than
16 attorney-client privilege. In fact, when I teach the
17 course, I draw a big circle for client confidentiality.
18 And inside that big circle, I have a smaller circle for
19 attorney-client privilege. I find that's pretty
20 effective to-- to have students grasp what we're talking
21 about here.

22 Q. Professor, you referred to a couple of Kansas
23 Rules of Professional Conduct. Can you tell-- tell us
24 how those are impacted in terms of the processing of
25 confidential information by a visually-recorded

1 statement made by-- or a video of an attorney-client
2 meeting?

3 A. Okay. Well, again, I mentioned Rule 1.6.
4 There's another rule, which is Rule 8.4, which is one
5 that defines professional misconduct. And an aspect of
6 professional misconduct is engaging in conduct that
7 tries to-- or attempts to or does violate one of the
8 Rules of Professional Conduct.

9 So an example that I sometimes use in teaching it
10 in a civil-- derives from a civil case where during a
11 deposition one attorney steps out in the hall to talk
12 with his client and leaves his folder on the table. And
13 opposing counsel looks inside that folder. In that
14 particular instance, opposing counsel was found to have
15 violated both the-- the ethics rule concerning
16 confidentiality, but also intruding into attorney-client
17 privilege for any privileged information that's there.
18 So that's Rule 8.4.

19 And another aspect of 8.4, based on at least my
20 initial understanding of the facts in this case, that
21 things were done surreptitiously or unknowingly or
22 secretly. Rule 8.4 makes it an ethical violation to
23 engage in conduct involving dishonesty, fraud, deceit,
24 or misrepresentation.

25 And so a reasonable lawyer would assume that

1 their meetings with their clients are ones that are not
2 being recorded. And absent a sign or some notice that
3 it's being recorded, there's also this aspect of
4 dishonesty, fraud, deceit, or misrepresentation taking
5 place.

6 Q. Professor, my final question. I'd like you to
7 amplify your last answer a little bit, because we've
8 been talking about how-- the impact of simply recording
9 an attorney-client visit. How is the attorney-client
10 privilege and the confidential-- the information
11 confidentiality, how is that affected by the further
12 action of turning that information over to a
13 prosecutor's office?

14 A. Okay. Well, in terms of attorney-client
15 privilege, even the Federal Rules of Evidence Rule 502
16 talks about disclosure being made in either a federal
17 proceeding or to a federal office or agency, so turning
18 over the recordings to a U.S. Attorney's Office or state
19 prosecutor's-- well, not state, but U.S. Attorney's
20 Office, at least in terms of the federal rules.

21 In terms of the ethics rule, by turning it over,
22 you know, if I was using this as a hypothetical in
23 class, I would say that-- that a prosecutor coming into
24 possession of these tapes and knowing that they were
25 being done secretly would've had both an obligation to

1 inform whoever was doing it that they should stop doing
2 it, would have an obligation not to look at them, and
3 then would have a further obligation to disclose to the
4 lawyers who had been filmed that they had been
5 surreptitiously filmed so that those lawyers could, you
6 know, take whatever action might be necessary to protect
7 their client's rights.

8 You know, every-- every lawyer, prosecutor and
9 defense lawyer, is also an officer of the court and has
10 an ethical obligation to try to promote justice. And in
11 this instance where a Sixth Amendment right is involved
12 and also the ethics rules, promoting justice would mean
13 taking those kind of actions. That concludes that
14 answer.

15 MR. REDMOND: I appreciate your patience.
16 That's all I have, Professor.

17 THE WITNESS: Okay. Thank you.

18 THE COURT: Do you have any questions, Ms.
19 Barnett?

20 MS. BARNETT: No, Your Honor. Thank you.

21 THE COURT: All right. I-- I have one
22 question, Professor Joy. This is Judge Robinson.

23 Have you examined at all the intersection
24 between legal ethics, professional responsibility, and
25 the obligations under Rule 6(e) of the Federal Rules of

1 Criminal Procedure?

2 THE WITNESS: I-- not in terms of Rule 6(e).
3 I have not looked into that.

4 THE COURT: All right. So you've spoken
5 about the obligations of a prosecutor who comes into
6 possession of attorney-client privileged information.
7 If they come into possession of that information by
8 virtue of a grand jury subpoena, such that it's Rule
9 6(e) information, and then use that information in an
10 unrelated case, sharing attorney-client privileged
11 information to an attorney or perhaps at least giving
12 that attorney access to their own privileged
13 information, but maybe-- maybe even access to other
14 attorney-client communications, but in an unrelated case
15 to the grand jury investigation, do you see a potential
16 Rule 6(e) violation as well?

17 THE WITNESS: I-- as I mentioned, Your
18 Honor, I-- I have not examined that closely. But based
19 on the scenario that-- that you've set forth, I would
20 say yes, because it's my understanding and it's-- you
21 know, it's been a while since I've looked at Rule 6(e),
22 but I believe that that is all supposed to be kept
23 confidential in connection with whatever the grand jury
24 was examining.

25 And so if it goes beyond the case or cases

1 that the grand jury was examining, then I believe it
2 would be a violation. But I'm saying that based on my--
3 my now somewhat dated recollection. So I-- I say that
4 with that qualification.

5 THE COURT: All right. Thank you. I don't
6 have any other questions. Does anybody else have any
7 questions?

8 MS. BARNETT: No, Your Honor. Thank you.

9 MR. REDMOND: No. Thank you, Your Honor.

10 THE COURT: All right. Thank you, Professor
11 Joy, for your time. We'll disconnect.

12 THE WITNESS: Okay. And thank you very much
13 for letting me testify via the telephone call.

14 THE COURT: All right. All right. So, Ms.
15 Brannon, are you prepared now to play the videotapes or
16 at least some of them? Obviously some of them.

17 MS. BRANNON: Yes, Your Honor. And I'm not
18 sure how the Court wants to set this up. It's-- what we
19 think is that Ms. Rokusek, Mr. Bussell, the Court, and
20 the court reporter should be the ones to actually view
21 what is on there and to be shown how it works with the
22 index and so forth.

23 Anybody else viewing it I think would be a
24 violation and just compound the problems that we have.
25 So I-- I might leave it to the prosecution about how

1 to-- how to set that viewing up, whether the Court wants
2 to go in chambers or do it here. Either way.

3 THE COURT: What-- what equipment? I mean,
4 is it on a PC that you can bring to my chambers or--

5 MS. BARNETT: I believe that we have a
6 laptop here, Your Honor, that the Court can use, and the
7 device that the-- I guess the DVRs go into. I guess I
8 would have to defer to Ms. Boyd for her expertise on
9 what will be required then to set it up for the Court to
10 view it.

11 MS. BOYD: All I need to do is reconnect it
12 back there for you and then they can take over and run
13 it.

14 THE COURT: Okay. Well, it probably would
15 be better to just stay in place and clear the courtroom.
16 Is this the last thing you intend to present?

17 MS. BRANNON: It is, Your Honor.

18 THE COURT: And do you all intend to present
19 any argument?

20 MS. BARNETT: Your Honor, the only thing
21 that I was going to ask the Court was maybe to allow us
22 to have a recess to decide whether or not we have any
23 additional evidence that we would want to present on
24 this issue or whether we simply want to ask the Court to
25 allow us to present some briefs or memorandums, at least

1 at this early juncture.

2 But quite frankly, we feel from our position
3 that until there's a review of these items and a
4 determination made as to whether or not they are, in
5 fact, privileged information, that that determination
6 then will help guide us and then how to further brief
7 and address issues that the Court may have.

8 THE COURT: All right. So what I was
9 intending to do is-- and I think it makes sense to give
10 you all time, and if we need to reconvene the hearing
11 before, for example, I issue a comprehensive order about
12 what relief and what to do next. But at a minimum, my
13 intention was at the close of the hearing today, and I
14 could certainly do it now in everyone's hearing and
15 before we otherwise close the courtroom, is I wanted to
16 make sure that I have-- have the original and all copies
17 of the recordings at issue from CCA.

18 I heard something during the hearing, some
19 suggestion that perhaps an investigator still had a copy
20 or something and I just wanted assurance that what
21 you're prepared to present-- provide to the Court, Ms.
22 Barnett, is everything. So there's no-- nothing else in
23 CCA's possession and nothing else in anyone's possession
24 at this point?

25 MS. BARNETT: Your Honor, I've been told

1 that there is simply two sets. One we received from CCA
2 and then I think a copy that was made. And we have both
3 sets here. What we believe in talking to the public
4 defender is that we are just confining this examination
5 or review to DVR 5 and DVR 6. There are four other
6 DVRs. But in looking at the index, we do not believe
7 that there are any questionable video-recordings on
8 them. So we do have those two sets here and I am
9 prepared to turn those over to the Court. Would you
10 like for me to mark them in any way?

11 THE COURT: Yes. I mean, identify them by 5
12 or 6. And I think we should put an exhibit number on
13 them.

14 MR. SLINKARD: They are marked.

15 THE COURT: They are marked?

16 MS. BARNETT: They are marked. The first
17 set, two boxes marked or titled Seagate Desktop DVR 5,
18 DVR 6. They are three-terabyte. And that's how the
19 boxes are labeled. And then there are two more boxes,
20 Seagate Expansion DVR 5, DVR 6. And on the outside of
21 each of these it says, "May contain attorney-client
22 material," which is the way that the agent was
23 instructed to mark these.

24 THE COURT: And from what I heard, I can't
25 review those unless I have the-- the reader that CCA

1 has?

2 MS. BARNETT: That is my understanding, Your
3 Honor.

4 THE COURT: And did they provide you with
5 that?

6 MS. BOYD: And I have it loaded on this
7 computer and we can-- I can give you a copy if you'd
8 like, too, Your Honor, to load on your own. However you
9 want to do it.

10 THE COURT: Okay. Well, I don't know that
11 I'm going to review the entire things anyway. I just
12 want to see what you have to show me, but-- so you're
13 providing them to me. They're going to be in the
14 Court's custody. I don't have access to them, in other
15 words. I can't view them without getting equipment
16 either from the U.S. Attorney's Office or from CCA. And
17 if I decide I need to do that, obviously I'll do that.

18 The other concern I wanted to address this
19 evening, and that is that, you know, there's an exhibit
20 that is an e-mail I think from Mr. Saburling (phonetic),
21 I can't remember his name, but anyway, it lists a number
22 of jails, county jails in Missouri, as well as CCA, and
23 what those institutions have told you all about what
24 they do and don't record.

25 There weren't any counties in Kansas, I

1 believe, that are used by our U.S. Marshal here in
2 Kansas, but I wanted to have some assurance going
3 forward that the U.S. Marshal would, if he hasn't
4 already, contact all of the jail-- all of the detention
5 facilities that are contracted in Kansas or contracted
6 with-- for Kansas defendants, that might include
7 Missouri counties as well, and assure that they are no
8 longer from this point forward doing any audio or
9 video-recording of any attorney-client visits or
10 communications. And that would include jail calls of
11 attorney-clients.

12 Because that particular e-mail tends to
13 indicate that some of these institutions are doing-- are
14 audio-recording all jail calls, including attorney
15 clients. And some of them are audio and video-recording
16 attorney-client visits. CCA is-- has been, according to
17 this, video-- video-recording attorney-client visits but
18 not audio-recording. And is audio-recording jail calls
19 between attorneys and clients if the call is initiated
20 by the-- by the detainee and the detainee doesn't tell
21 the jail that they're calling their attorney. And I
22 don't know, maybe that's zero calls or maybe it's a lot
23 of calls, I don't know.

24 But in other words, a sort of injunction I
25 want to put into effect this evening that the U.S.

1 Marshals Service will tell all of these facilities they
2 are to cease to desist immediately from any audio or
3 video-recording of any attorney-client communications,
4 whether it's by phone or face-to-face, so that we can be
5 assured that there's no further violations of the Sixth
6 Amendment going forward.

7 And-- well, I had some other thoughts, but
8 at least for now, that's what I intended to orally say.
9 And I certainly can follow that up with a short order
10 tomorrow if there's any question about exactly what I'm
11 ordering the U.S. Marshal to do, as well as making sure
12 the U.S. Attorney's Office has provided all of the
13 copies of such recordings from CCA.

14 All right. I'm prepared to clear the
15 courtroom. The one other thing that I'll want to
16 address with you, and I think I will wait, though, until
17 you've had a chance to tell me whether you're going to
18 respond, Ms. Barnett, is appointment of a special
19 master. And my initial thought at this point is I think
20 it's a good idea to appoint a special master, but not
21 just to start digging in and going through everything.

22 I first-- I think I would only authorize
23 appointment just for that person to tell us the scope of
24 the review and how much-- and I'm still real unclear
25 about this, maybe you can tell me, clarify this for me

1 now, but does this involve going through the whole
2 universe of recordings and segregating out all
3 attorney-client communications from that? Or are they
4 already segregated on 5 and 6?

5 And in other words, I'm trying to get some
6 sense of how much work and how much money would be
7 involved in going through thousands of communications
8 and trying to segregate out attorney-client
9 communications in this case and other cases, I mean, any
10 that happened in the facility itself. Mr. Slinkard?

11 MR. SLINKARD: Your Honor, I don't know that
12 we can give you an exact estimate. It's-- it's our
13 understanding DVR 5 is being included because it lists
14 on the index "Low Custody Attorney."

15 Now, we asked the question and the
16 information that we received from the security staff,
17 the same security staff at CCA that had spoken with
18 the-- with the defenders I believe yesterday at the
19 interview, was that that actually is just the hallway
20 outside the attorney visiting rooms. Okay? That's the
21 only camera depicted on DVR 5 that, because of its
22 labeling, had an arguable issue. And for now, until
23 that can be run down, we've agreed to provide it to the
24 Court.

25 DVR 6 contains feeds from numerous other

1 cameras, and then includes one labeled Attorney Room,
2 Attorney Room 4, Attorney Room 5, 6, 7, 8 and 9 in
3 sequence.

4 THE COURT: Okay. So it does-- it does
5 include cameras in other areas of the jail--

6 MR. SLINKARD: Yes.

7 THE COURT: -- that would not presumably
8 have privileged communications?

9 MR. SLINKARD: Yes.

10 THE COURT: Okay.

11 MR. SLINKARD: And based on what was-- was
12 described to us by-- by CCA, as we've continued to try
13 and inquire about this, it's our understanding that they
14 have-- you know, these digital video-recorders, not
15 these particular ones, but the digital video-recorders
16 at the facility are set up in such a way that it would
17 be recording feed automatically. The machine is
18 recording feed. And when it gets full, it starts over
19 at the beginning and it writes over.

20 So there's-- depending on the number of
21 cameras feeding in, the capacity of the DVR, they
22 suggested that there was something like a 30- to 60-day
23 window before data would be overwritten. Now, of
24 course, if it starts overwriting with the oldest first -
25 and we don't know that 100 percent because, again, we

1 haven't-- don't want to look at these until we've-- the
2 Court has resolved whether there's a privilege issue -
3 there may be slightly more than that time period
4 because, you know, something that was recorded before--
5 right at the end of it starting over that it hasn't
6 gotten to erasing it yet.

7 THE COURT: Okay.

8 MR. SLINKARD: So that's sort of the-- the
9 landscape in terms of the actual volume of recordings
10 that are directly applicable to the camera feeds that
11 the Court may be concerned with. That's about as exact
12 as we can be, not having reviewed them.

13 THE COURT: All right. So it sounds like at
14 the very least if we just talk about DVR 5, is you say
15 three terabytes of information somebody would have to go
16 through, plus what-- I guess the other one as well.

17 MR. SLINKARD: Each DVR-- DVR 5 and DVR 6
18 are three-terabyte drives. I don't know if we can say--

19 MS. BOYD: They're not necessarily full.

20 MR. SLINKARD: -- that they're full.

21 THE COURT: Okay. Potentially as much as
22 six terabytes between the two, but probably not that
23 much, in other words.

24 MR. SLINKARD: And again, it's our belief--
25 but out of an abundance of caution, we're giving them

1 both up. It's our belief that DVR 5 doesn't actually
2 contain any video from any feeds within an
3 attorney-client meeting room at CCA.

4 THE COURT: Okay.

5 MR. SLINKARD: That those would all be on 6.

6 THE COURT: Okay. And what does a-- one
7 terabyte translate into in terms of time of a
8 video-recording, any idea?

9 MS. BOYD: You can't really determine that.
10 It's multiple cameras, Your Honor, so there could just
11 be just a few minutes even because of it being a room
12 that's not used very often, as opposed to the rest of
13 the rooms that are on 5 that are representative of pods
14 or whatever.

15 THE COURT: But essentially CCA has told you
16 that they video-record all these areas in the jail 24/7.
17 And depending on the capacity of the DVR, there's a sort
18 of overwrite every 30 days, so-- or more. So it could
19 be that maybe, at a minimum, 30 days, 24/7 recordings of
20 many areas, the entire jail, in other words. Correct?

21 MS. BOYD: That's my understanding. And
22 it's also my understanding that the original literally
23 was their original. They removed them and gave them to
24 us as is because they didn't know how to segregate
25 anything out for us specifically. So they just gave us

1 a whole dump of everything that they had. So then they
2 put new drives in and started over. That was my
3 understanding.

4 THE COURT: All right. Which again
5 illustrates why I need to make it clear that they are
6 not to have any recordings going on in those attorney
7 rooms from this point forward. I'll issue a written
8 order tomorrow, but somebody needs to tell them that
9 tonight.

10 MS. BRANNON: Your Honor, may I? Regarding
11 the other facilities in Kansas, Exhibit I think 434 by
12 Mr. Thompson, he's tried to do a survey that should give
13 the Court some indication about what the practices are.
14 I think the parties would also-- may have a proposal for
15 the perhaps scope and scale and procedure that we think
16 might be helpful to any special master. And we'll try
17 to provide that to the Court as soon as possible.

18 We-- I will tell the Court that there have
19 been times that we have received other attorney-client
20 phone calls in discovery. So we know that this
21 happened. Not, you know, in this case, but in other
22 cases where that happens. So we know they are recorded
23 and provided and we don't know how, so that would
24 certainly be part of it.

25 And we did talk to the prosecution about

1 sequestering two of these, 5 and 6. However, Ms.
2 Rokusek points out that we really don't know what's on
3 the other videotapes. We have an index from the
4 prosecutor. We know what CCA-- or we don't actually
5 know what CCA says exactly. So all six of these boxes,
6 we believe, should be preserved right now, both copies
7 turned over to the Court, until we actually know what's
8 on them. That doesn't mean that somebody is going to
9 have to go through everything on all of them, but at
10 least until we have some verification that it does not
11 include any attorney-client communication. There's some
12 things listed on the index we simply don't know what
13 they are.

14 So as Ms. Rokusek points out, we're really
15 not in a position to say that the other four should be
16 left with the U.S. Attorney and be disseminated to
17 everybody else. So we would ask that be taken in. And
18 if we could have-- get some written confirmation from
19 CCA that they no longer have these copies, I think that
20 would be helpful.

21 MS. BARNETT: Your Honor, I might also
22 clarify that Ms. Boyd has informed me that this index,
23 although there is an exhibit presented by the defense
24 that shows metadata that this document was created,
25 actually the index itself was provided by CCA. So CCA

1 is the one that told us that DVR 1, the camera names
2 are... and lists. And DVR 2, and the same for all of
3 them.

4 So this isn't a matter of our office or Ms.
5 Boyd actually looking at the tapes and creating this
6 index. CCA provided that in a file format and then Ms.
7 Boyd took that and turned that into this document from
8 their information that they provided.

9 THE COURT: And that was back in June that
10 CCA provided the index?

11 MS. BARNETT: When did they provide the
12 index?

13 MS. BOYD: I would have to look, Your Honor,
14 because they gave it to me in a spreadsheet format is
15 what they did, they e-mailed it to me, so-- because we
16 asked for it. We were in the same position, we didn't
17 know what camera was what, so we asked for that and
18 that's what they sent me.

19 THE COURT: All right. So we want to secure
20 all original and all copies of recordings in the Court's
21 custody at this point of all six DVR boxes. We want
22 written assurance from CCA that they have no additional
23 copies. And I want the United States Marshal to contact
24 all detention facilities contracted with for Kansas
25 detainees and tell them the Court has ordered no further

1 audio or video-recordings of any attorney-client visits,
2 no recordings of any attorney-client phone calls, no
3 audio or visual recordings of video-conference calls.
4 Obviously those are videoed as they go, but no
5 recordings of such. And a further order to follow on a
6 special master.

7 What I'll ask is after today, you all advise
8 the Court within seven days whether you intend to file
9 anything else or need an additional hearing. And if you
10 all can stipulate as to some sort of process for a
11 special master or the scope of the special master
12 review, I'd ask you to submit that to me as well, and
13 then I'll do as quickly as I can an order appointing a
14 special master.

15 All right. Anything else we need to talk
16 about before we clear the courtroom to look at these
17 videos?

18 MS. BARNETT: The only other thing I would
19 tell the Court is that with regard to the copies of the
20 DVRs that we had in our office, we have all six and
21 we're prepared to turn those over to the Court today.
22 We had only asked the agent to provide us with DVR 5 and
23 6. So we will get DVRs 1 through 4 from him as soon as
24 possible and provide those to the Court as well.

25 THE COURT: Okay.

1 MS. BARNETT: Nothing else, Your Honor.

2 Thank you.

3 THE COURT: All right. You're ready, Ms.

4 Brannon?

5 MS. BRANNON: Yes. I didn't know if the

6 Court expected or wants us to stay for the Court to

7 adjourn the hearing after viewing this or--

8 THE COURT: It sounded like I'll need some

9 assistance in playing them. And I don't know if

10 everyone needs to stay or whether Ms. Boyd and Mr.

11 Bussell can help me enough. If they can, then everyone

12 else can leave, including the parties.

13 MS. BRANNON: Thank you, Judge.

14 THE COURT: Okay. So we'll recess and I'll

15 ask Ms. Boyd and Mr. Bussell to stay. All right.

16 MR. SLINKARD: Judge, I guess Ms. Boyd has

17 the equipment set up. She believes it's working. With

18 your permission, we'll just all withdraw and leave you

19 with Ms. Rokusek and her investigator and the--

20 THE COURT: Okay. Thank you, Mr. Slinkard.

21 MR. SLINKARD: And I told Bonnie the-- the

22 drives are all over there. The white box set are the

23 originals, as I understand it, from the agents. And we

24 only have 5 and 6 at this time. We'll work on getting 1

25 through 4 as soon as we can.

1 THE COURT: Okay. And the black are the
2 copies?

3 MR. SLINKARD: The black are the copies from
4 our office and all 1 through 6 are there.

5 THE COURT: Okay. Got it. All right.
6 Thank you.

7 (The remaining proceedings are sealed and
8 will require a Court order to be transcribed).

9 (4:33 p.m., proceedings recessed).

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C E R T I F I C A T E

I, Kelli Stewart, a Certified Shorthand Reporter and the regularly appointed, qualified and acting official reporter of the United States District Court for the District of Kansas, do hereby certify that as such official reporter, I was present at and reported in machine shorthand the above and foregoing proceedings.

I further certify that the foregoing transcript, consisting of 117 pages, is a full, true, and correct reproduction of my shorthand notes as reflected by this transcript.

SIGNED August 11, 2016.

/s/ Kelli Stewart

Kelli Stewart, CSR, RPR, CCR, RMR