

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

UNITED STATES OF AMERICA,
Plaintiff,

v.

Case No. **2:16-cr-20032-JAR**

**LORENZO BLACK,
KARI CARTER,
ANTHON AIONO,
ALICIA TACKETT,
CATHERINE ROWLETTE,
DAVID BISHOP,**
Defendants.

**MOTION FOR COURT TO IMPOUND ADDITIONAL
GOVERNMENT EVIDENCE**

The defense asks the Court to order the government to produce all attorney-client phone recordings seized from CCA as a part of this investigation, along with an accounting of its dissemination to defense counsel and to anyone else. CCA recorded attorney-client phone calls, gave those calls to the USAO, and the USAO has distributed the protected communication to other defendants. The recording, seizure, and dissemination of those confidential attorney-client phone calls violates constitutional, legal, and ethical rules just as did CCA's recording and production of confidential attorney-client visits. And, likewise, the issues here

extend beyond privilege, given the magnitude of the USAO search and seizure.

Since the August 9, 2016, hearing, the defense has learned that recorded attorney-client phone calls are part of the government's discovery in this case and have already been disseminated to other defendants. The government had informed *Black* counsel that the USAO targeted the recorded phone calls of some 50 CCA inmates, but did not offer that these include attorney-client phone calls.¹ Counsel in *U.S. v. Black* have now discovered that some phone calls date back to 2011. These calls include defendants and counsel who are unrelated to the investigation or charges in *U.S. v. Black*. As far as *Black* defense counsel can ascertain, all but one of the clients whose attorney-client calls were recorded are *not* defendants in this case.² The phone calls far exceed the conspiracy timeline or participants alleged in the *U.S. v. Black* complaint, but the full scope of the intrusion is not yet known. Should the government oppose the Court taking possession of the phone calls, the defense is prepared to present evidence in support of the request.

¹ August 9 Rule 41(g) Motion Hrg., Exh. 446.

² And, the one client who is charged in this case, Karl Carter, was calling a different attorney, in an unrelated case.

The defense asks the Court to hear this motion at the hearing scheduled for August 16, 2016, at 1:30.

Respectfully submitted,

s/Melody Brannon
MELODY BRANNON #17612
Federal Public Defender for the
District of Kansas
117 SW 6th Avenue, Suite 200
Topeka, Kansas 66603-3840
Phone: 785/232-9828
Fax: 785/232-9886
E-mail Address: melody_brannon@fd.org

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2016, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

Donald Christopher Oakley
Assistant United States Attorney
Office of the United States Attorney – Kansas City
chris.oakley@usdoj.gov

Erin S. Tomasic
Assistant United States Attorney
Office of the United States Attorney – Kansas City
erin.tomasic@usdoj.gov

Debra L. Barnett
Criminal Chief
Assistant United States Attorney
Office of the United States Attorney – Wichita
debra.barnett@usdoj.gov

Duston Slinkard
Criminal Coordinator
Assistant United States Attorney
Office of the United States Attorney – Topeka
Duston.Slinkard@usdoj.gov

John Jenab
Jenab Law Firm, PA
john.jenab@gmail.com

David J. Guastello
The Guastello Law Firm, LLC
david@guastellolaw.com

Jason P. Hoffman
Hoffman & Hoffman
jphoffman@sbcglobal.net

Kathleen A. Ambrosio
Ambrosio & Ambrosio Chtd.
kaambrosio@yahoo.com

Michael M. Jackson
jacksonmm@aol.com

Cynthia M. Dodge
Cynthia M. Dodge, LLC
cindy@cdodgelaw.com

Shazzie Naseem
Berkowitz Oliver LLP - KCMO
snaseem@berkowitzoliver.com

Catherine A. Zigtema
Law Office of Kate Zigtema LC
kate@zigtemalaw.com

Jonathan L. Laurans
jlaurans@msn.com

Jacquelyn E. Rokusek
Rokusek Law, LLC
rokuseklawoffice@yahoo.com

s/ Melody Brannon
Melody Brannon

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**DEFENSE MEMORANDUM IN SUPPORT OF
MOTION FOR SPECIAL MASTER**

Before the Court is a joint request for appointment of a Special Master. The defense proposes that the scope of a Special Master's inquiry should extend beyond cataloging the video recordings of attorney-client visitation at CCA. The USAO's conduct in this case raises questions about its conduct in other cases, as well as its policies, practices, and access to other forms of protected communication. A focused, efficient, and authoritative inquiry would be valuable to the Courts and the litigants.

This Court has authority to appoint a Special Master both by Fed. R. Civ. P. 53,¹ and by its inherent power to manage litigation.² The defense has

¹ While “the civil rules are not expressly applicable to criminal cases, the courts have used the principles somewhat interchangeably.” *United States v. Loera*, ___ F.Supp.3d ___, 2016 WL 1730357 at 18 (D. N.M. 2016); *see, e.g., United States v. Christy*, 739 F.3d 534, 539–40 (10th Cir. 2014); *United States v. Huff*, 782 F.3d 1221, 1223–24 (10th Cir.2015); *but see United States v. Nacchio*, 555 F.3d 1234, 1245 (10th Cir. 2009).

² *In re Peterson*, 253 U.S. 300, 312-13 (1920) (“Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause. From the commencement of our government it has been exercised by the federal courts, when sitting in equity, by appointing, either with or without the consent of the parties, **special masters**, auditors, examiners, and commissioners.”) (emphasis added); *Schwimmer v. United States*, 232 F.2d 855, 865 (8th Cir. 1956) (The “Court may, in its discretion, make appointment of a **Master** to assist in any of the incidents of a proceeding before it, whether civil or criminal, so long as there is no infringement upon the right of trial by jury or any prejudice to other substantive right.”); *Ruiz v. Estelle*, 679 F.2d 1115, 116 n. 240 (5th Cir. 1982), *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982) (same); *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 746 (6th Cir. 1979) (noting that the authority to appoint “expert advisors or consultants” derives from either Rule 53 or the court’s inherent power); Irving R. Kaufman, *Masters in the Federal Courts: Rule 53*, 58 Colum. L. Rev. 452, 462 (1958) (“Over and above the authority contained in Rule 53 to direct a reference, there has always existed in the federal courts an inherent authority **to appoint masters** as a natural concomitant of their judicial power.”)

attached a proposed Order³ that outlines the suggested scope of a Special Master inquiry.

When the Court finds a Sixth Amendment violation, it must “identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial.”⁴ Available remedies include suppression of evidence,⁵ recusal of prosecutors involved in the violation,⁶ and dismissal of the indictment.⁷ Given the volume of material and the importance of the issues, appointment

³ The proposed Order is fashioned after the requirements set forth in Fed. R. Civ. P. 53, and by the example provided by the [Federal Judicial Center](#), *Appointing Special Masters and Other Judicial Adjuncts* (2d Ed. 2009).

⁴ *United States v. Morrison*, 449 U.S. 361, 365 (1980).

⁵ *Schillinger*, at 1143 (“*Morrison* makes clear that evidence obtained through an intentional and improper intrusion into a defendant’s relationship with his attorney, as well as any ‘fruits of [the prosecution’s] transgression,’ . . . must be suppressed in proceedings against him.”).

⁶ *Id*; *United States v. Horn*, 811 F. Supp. 739, 752 (D.N.H. 1992) (removing the lead prosecutor from the case and ordering her “not to discuss the documents with any prosecutor or witness in this case and not to participate further in any way, directly or indirectly, in the trial preparation or trial of this case”), *rev’d in part on other grounds*, 29 F.3d 754 (1st Cir. 1994).

⁷ *Schillinger v. Haworth*, 70 F.3d 1132, 1143 (10th Cir. 1995).

of a Special Master is essential to factual exposition and the determination of an appropriate remedy.⁸

The record justifies a Special Master. CCA has routinely and surreptitiously recorded video of meetings between counsel and clients that were supposed to be confidential. Attorney-client phone calls were also recorded. Those recordings were then provided to the District of Kansas U.S. Attorney's Office, without notice to any of the defendants. Only when the USAO chose to reveal the recordings did the defense learn of CCA's recording and dissemination practice. And only when the USAO chose to disclose the recordings in discovery and to counsel in an effort to remove her from a case did the defense learn of the USAO's intrusion into attorney-client communications, communications that are protected constitutionally, legally, and ethically. Now, the extent of the phone call recording and dissemination is a pressing, and not yet fully explored, breach into confidential legal communications.

⁸ *Id.* at 1143 (“Given the inadequacy of the state court factfinding procedures in this case, we have serious concerns about the extent of the prosecutor’s intrusion. On the record before us, we cannot determine whether the prosecutor obtained and used other information relevant to Haworth’s criminal proceedings that may prejudice Haworth upon retrial of the matter.”).

Litigation of confidentiality issues is inevitable across the district. These issues can reasonably be expected to appear in motions for discovery, motions to continue, motions for recusal, motions to dismiss, motions to suppress, motions to set aside pleas, motions for sentencing variances, post-trial motions, and post-conviction motions (appeal waivers do not apply to claims of prosecutorial misconduct). A Special Master could coordinate fact-finding and make recommendations that would inform the possible disposition of such litigation. A Special Master inquiry, if adequately defined and resourced, could lessen time-consuming litigation and provide confidence in the outcome. A Special Master would be more effective, efficient, and economical than piecemeal investigation and litigation, so long as the results were accessible to the litigants.

Furthermore, the defense is limited in its ability to fully investigate the extent of the government's conduct, as shown by the evidence presented at the August 9, 2016, hearing. A government investigation of its own misconduct is unsatisfactory for a multitude of reasons.⁹ But a Court-directed inquiry through a Special Master would solve the defense limitations and avoid concerns about an USAO internal investigation.

⁹ See *United States v. Bowen*, 799 F.3d 336, 351-355 (5th Cir. 2015) (criticizing DOJ investigation into its own attorney misconduct as inadequate and procedurally deficient).

Conclusion

In the short time since our last hearing, we have developed additional evidence that the attorney-client privilege had been breached by the government. We are prepared to present that evidence at the hearing. But instead of the presentation of additional evidence, and case-by-case litigation, we ask this Court to appoint a Special Master. In this exceptional case, this is an appropriate measure.

Respectfully submitted,

s/Melody Brannon

MELODY BRANNON #17612

Federal Public Defender for the
District of Kansas

117 SW 6th Avenue, Suite 200

Topeka, Kansas 66603-3840

Phone: 785/232-9828

Fax: 785/232-9886

E-mail Address: melody_brannon@fd.org

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debra.barnett@usdoj.gov

Duston Slinkard
Criminal Coordinator
Assistant United States Attorney
Office of the United States Attorney – Topeka
Duston.Slinkard@usdoj.gov

John Jenab
Jenab Law Firm, PA
john.jenab@gmail.com

David J. Guastello
The Guastello Law Firm, LLC
david@guastellolaw.com

Jason P. Hoffman
Hoffman & Hoffman
jphoffman@sbcglobal.net

Kathleen A. Ambrosio
Ambrosio & Ambrosio Chtd.
kaambrosio@yahoo.com

Michael M. Jackson
jacksonmm@aol.com

Cynthia M. Dodge
Cynthia M. Dodge, LLC
cindy@cdodgelaw.com

Shazzie Naseem
Berkowitz Oliver LLP - KCMO
snaseem@berkowitzoliver.com

Catherine A. Zigtema
Law Office of Kate Zigtema LC
kate@zigtemalaw.com

Jonathan L. Laurans
jlaurans@msn.com

Jacquelyn E. Rokusek
Rokusek Law, LLC
rokuseklawoffice@yahoo.com

s/ Melody Brannon

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Defendants.

ORDER APPOINTING SPECIAL MASTER

The joint request for an appointment of a Special Master is submitted to the Court upon the motion of the Federal Public Defender. Counsel appearing for the defendants are John Jenab, David Guastello, Jason Hoffman, Kathleen Ambrosio, Michael Jackson, and Cynthia Dodge. Melody Brannon and Kirk Redmond of the Federal Public Defender's Office appear as Movants. Counsel appearing for the Government are Debra Barnett, Duston Slinkard, and Emily Metzger.

The Court has given the parties notice and an opportunity to be heard.

¹Exercising its inherent authority to manage litigation, and its authority

¹ See Fed. R. Civ. P. 53(b)(1).

under Fed. R. Civ. P. 53, **IT IS HEREBY ORDERED** that [Special Master's Name] of [Address] is appointed Special Master.

Scope of Special Master Inquiry

The Special Master shall inquire determine:

1. The past and current policy and practice of all holding facilities under contract with the United States Marshal Service to house pretrial detainees in the District of Kansas with regard to:

- 1.1 Video recordings of attorney-client communication;²
- 1.2 Audio recordings of attorney-client communication;
- 1.3 Any other means of surveilling attorney-client communication;
- 1.4 Recording or monitoring legal mail.

2. When and under what circumstances each facility makes or has made available to any third party, including law enforcement officials and the United States Attorney's Office, the follow materials, without regard to any claim of waiver:

- 2.1 Video recordings of attorney-client communication;
- 2.2 Audio recordings of attorney-client communication;
- 2.3 Legal mail.

² For purposes of this Order, "counsel," "attorney-client," and "legal communication" will include other members of the defense team who fall within the scope of attorney-client confidentiality and privilege, including investigators, interpreters, experts, and other designated service providers.

3. The instances in which the Kansas United States Attorney's Office or its agents has sought production, formally or informally, of any attorney-client communications for use in an investigation or prosecution, and, in those instances,

- 3.1 whether counsel or the defendant were notified;
- 3.2 whether the materials were used in the investigation or prosecution;
- 3.3 whether the materials were made available or disseminated to others; and
- 3.4 whether those materials are still in the possession of the Kansas USAO.

4. The instances in which the United States Attorney's Office has inadvertently come into possession of any attorney-client communications from any Kansas holding facility during an investigation or prosecution, and,

- 4.1 whether counsel or the defendant were notified;
- 4.2 whether the materials were used in the investigation or prosecution;
- 4.3 whether those materials were disseminated or made available to others;
- 4.4 whether those materials are still in the possession of the USAO; and
- 4.5 how the USAO or its agents came to be in possession of the attorney-client communications.

5. With regard to *United States v. Black*, 16-cr-20032-JAR, and related cases,
 - 5.1 the scope of the recordings;
 - 5.2 how the video recordings of attorney-client meetings or phone calls were identified;
 - 5.3 whether there was any audio of the attorney-client meetings;
 - 5.4 who had knowledge of or access to the recordings, including any USAO-designated internal privilege review team, and whether there was any derivative action, prosecution, or investigation as a result of that knowledge or access;
 - 5.5 who actually viewed or heard any of the recordings and when, and whether there was any derivative action or investigation as a result of that viewing.
6. Determine, to the extent possible, which defendants and which attorneys are on the video recordings or on the phone recordings.
7. Determine whether and when the U.S. Marshal has obtained confidential recordings of attorney-client communications.
8. Any other inquiry the Special Master, in consultation with the Court, deems reasonable and necessary.

Authority of the Special Master

[Special Master's Name] shall have the sole discretion to determine the appropriate procedures for resolution of all assigned matters and shall have the authority to take all appropriate measures to perform the assigned

duties. The Special Master may by Order impose upon a party any sanction other than contempt and may recommend a contempt sanction against a party and contempt or any other sanction against a non-party.

To discharge the above duties, the Special Master shall be allowed to engage in ex parte conversations with counsel for the parties in order to permit full consideration of the issues. Any ex parte conversation will be conducted on the record in order to permit appropriate review by the undersigned Court or the appellate courts.

The Special Master shall be paid \$ ____ per hour for work done pursuant to this Order, and shall be reimbursed for all reasonable expenses incurred.

The Special Master is authorized to hire _____ to assist in completion of the matters referred to the Special Master by this Order.

The Special Master is directed to proceed with all reasonable diligence to complete the tasks assigned by this Order, and shall submit to the Court written findings and recommendations.

Access to the Special Master Findings

The parties shall file with the Clerk all papers for consideration by the Special Master. The Special Master shall also file with the Clerk all reports

or other communications with the undersigned Court.³ At the conclusion of the Special Master's inquiry, the Court shall, at its discretion, make available to the parties the findings and recommendations of the Special Master.

Any party seeking review of any ruling of the Special Master shall comply with the requirements of Fed. R. Civ. P. 53(f).

IT IS SO ORDERED.

Date:

The Honorable Julie A. Robinson
United States District Court Judge

³ Fed. R. Civ. P. 53(b)(2)(C).