

**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.

**Memorandum in Support of
Proposed Order to Appoint a Special Master**

The defense proposed Order to Appoint a Special Master (attached) is designed to deal with the immediate discovery issues in this case and related cases; to allow for fact-finding as to past and current practices that may have resulted in Sixth Amendment violations; and to recommend appropriate actions and remedies available to this Court.

The Court has the authority to appoint a Special Master both by Fed. R. Civ. P. 53 and under its inherent power to manage litigation. Based on the government's response, D.E. 110, the government seeks an Order authorizing a Special Master to perform a very narrow set of clerical tasks. Thus, no consent to the scope of the Special Master has been

reached by the parties. The Court, however, may order a Special Master, even with no consent, if the Special Master is to hold trial proceedings and make or recommend findings of fact if the appointment is warranted by some exceptional condition.¹ Also, the Court may appoint a Special Master, without consent of the parties, to address pretrial and post-trial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.²

Exceptional Conditions

Several exceptional conditions exist in this case to justify the proposed scope of the Special Master inquiry:

First, the recording, both by video and audio, of protected attorney-client communications of pretrial detainees has been established and was previously unknown to the Court or to the defense. The practice and purpose of these recordings, the time-span, the facilities that engaged in these recordings, and the distribution of these recordings to any USAO or agent, present an exceptional condition that requires the broad inquiry and authority of a Special Master.

¹ See Fed. R. Civ. Pro. 53(a)(1)(B)(i).

² See Fed. R. Civ. Pro. 53(a)(1)(C).

Second, the USAO subpoenaed and attempted distribution video recordings protected attorney-client communications and actually distributed of audio recordings of protected attorney-client communication. To date, the USAO's knowledge, intent, and purpose in obtaining these recordings is unknown; the manner in which it obtained protected attorney-client phone calls is still unknown; the frequency and breadth of this practice in other cases is not yet known. This qualifies as an exceptional condition and an area of inquiry that cannot be completely and timely assessed by the Court.

Third, the government's attempt to actually use the subpoenaed video recordings of specific attorney-client meetings, and the content of those recordings, to force a defense attorney to withdraw from two cases is, independently, an exceptional condition that warrants appointment of a Special Master to determine the pervasiveness and effectiveness of this prosecution tactic in this and in other cases. This, too, is an area that cannot be efficiently assessed by the Court without the assistance of a Special Master.

Fourth, the unknown scope and time span of this practice of obtaining, whether inadvertently or intentionally, and then using protected communications by the USAO, and the many cases, both pending and

completed, that may have been compromised by this practice also qualifies as an exceptional condition, and demands the assistance of a Special Master to effectively and efficiently investigate.

Fifth, the government's response has been unhelpful to the Court. It has not answered the most piercing questions before the Court, such as how and why this happened and whether it has happened before. It has not responded to the defense evidence, which stands unrefuted before this Court.³ It has not provided accurate information to the defense.⁴ Instead, it has challenged standing of the parties and sought to divest this Court of jurisdiction,⁵ even resorting to accusations of defense forum shopping.⁶ The refusal of the government to respond to the defense or to inform the Court is an exceptional condition that calls for appointment of a Special Master.

³ August 9, 2016, tr. at p. 115 (the parties were to "advise the Court within seven days whether you intend to file anything else or need an additional hearing.").

⁴ See, e.g., Ex. 443 (August 4, 2016, email forwarded by the USAO from the U.S. Marshal assuring that CCA did not, and could not, video record attorney-client visitation).

⁵ D.E. 110, First Gov't Response at pp. 8-14.

⁶ *United States v. Huff*, D. Kan. Case # 14-20067-CM, Status Conf. Transcript. August 22, 2016, p. 5.

Scope of the Inquiry

The first goal in the proposed Order is to determine which portions of the discovery in this case must be withheld because of privilege and confidentiality concerns, and which portions may be disseminated to the parties. We suggest that the Special Master simply excise the video recordings of the attorney rooms.⁷ Reviewing each and every visit, “item by item” “recording by recording” as the government argues,⁸ for content is burdensome and of little benefit to the Court or to the parties. A review of CCA visitation records will tell which attorneys and clients met during the relevant time period. This will allow discovery and other litigation to proceed in the affected cases. It is also a much more economical approach than that suggested by the government.

To fully assess the reach of the privilege violations, the Special Master must have access to the documents, ESI, and technology necessary to determine whether and when any of the recorded communications were

⁷ The one caveat is this: there is both evidence from the government (Ex. 447, pp. 11-12) and independent evidence that may be available to the Special Master that CCA had both the ability to audio record these attorney client meetings and may have actually done so on occasion. CCA’s denial is of little meaning, as are government claims that they are unaware of audio recordings. Should the Special Master develop sufficient information, the video recordings should be available for review at the Special Master’s discretion.

⁸ D.E. 110, Gov’t Resp. at 12.

reviewed, and how and whether there is a practice or policy of the USAO obtaining, for example, recorded privileged telephone calls. Expanding the inquiry beyond the protected communications in this case is necessary to determine whether this was or is a routine and pervasive means of investigation and prosecution.

Free and ready access to information is critical to the Special Master's inquiry. This may require defense attorneys to disclose confidential or privileged attorney-client information. An attorney must be assured that making such disclosures will not waive either confidentiality or privilege. The Court should grant the Special Master authority to solicit this information with the protection of Kansas Rule of Professional Conduct 1.6. That information should remain confidential, and used only to direct further Special Master investigation, to prepare the Report, and for the Court to disclose as necessary, with notice to the affected parties.

Likewise, the government will have a strong interest in protection of confidential information relevant to ongoing investigations, pending charges, and in protecting certain witnesses. Accordingly, the similar protection should be afforded to the USAO.

In order for the Special Master to thoroughly investigate the facts he must have the cooperation of all parties and their agencies. If any party or

person refuses to cooperate with the requests of the Special Master, they must have the authority to impose sanctions or other enforcement measures against any person obstructing the inquiry.⁹ The government has refused to explain, much less deny, its possession and use of the recordings, and whether this was a common investigative or prosecutorial tool. General allusions to inadvertent possession should be well investigated, first because it is belied by the evidence in the record, and second, because the government's handling of the protected material, both in attempting to gain advantage in litigation and by disseminating the protected material, was the wrong response, both legally and ethically, to inadvertent possession of protected material. For the Special Master to address any such issues, there must be some means of compelling information and cooperation, as well as enforcing the Order of the Court.

⁹ Today, we are still unaware of how the privileged attorney-client phone calls came to be in the government's possession. Requests for material, such as the spreadsheets that CCA provided to help identify the video camera placement (August 9, 2016, transcript at p. 114), remain unanswered. And even as *Black* counsel were identifying and reviewing protected attorney-client phone calls recorded by CCA and disseminated by the government, CCA continued to maintain that attorney-client phone calls were not recorded. KCUR, [*Discovery of Video Recordings at Leavenworth Detention Center Spurs Outrage*](#), August 12, 2016 ("We do not record inmate/attorney telephone conversations at Leavenworth or any other CCA facility," CA Jonathan Burns, CCA spokesman).

For these reasons and others previously presented to the Court, the defense asks the Court to grant the attached proposed Order Appointing Special Master.

Respectfully submitted,

s/Melody Brannon
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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 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:

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**LORENZO BLACK,
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ORDER APPOINTING SPECIAL MASTER

On August 9, 2016, and again on August 16, 2016, the Court heard evidence and argument from the parties regarding Sixth Amendment violations arising from the United States Attorney's Office possession of surreptitious video recordings of attorney-client meetings and audio recordings of attorney-client communications at the pre-trial holding facility, Corrections Corporation of America (CCA). Counsel in this, and other cases, filed various motions challenging the recordings and the government's possession and use of the recordings. The recordings have been taken into the Court's custody until further order of the Court.

As the record stands now, the recordings of the attorney-client communications violated the Sixth Amendment. The scale and scope, however, are not yet established, nor is the full extent of the violations, whether constitutional, legal, or ethical. Because of the potential magnitude of the violations and the voluminous evidence to be gathered and reviewed, the Court has determined that exceptional conditions exist and that matters exist that cannot be effectively and timely addressed by an available district court judge or magistrate judge in the district.

Thus, the Court finds that a Special Master is appropriate and shall be appointed to assist the Court in determining what discovery may be released, what must be retained, the scope of the recordings, the knowledge, intent and purpose of the USAO in obtaining protected communications, and what remedies, if any, may be appropriate. The initial objectives and powers of the Special Master are set forth below. The Court may expand the scope of the inquiries, or the authority needed to meet the objectives, upon request of the Special Master.

Objectives of the Special Master

Objective One:

To determine what materials obtained by the government in this case are covered by the attorney-client¹ privilege, confidentiality, or other privacy protections (protected materials), and to determine how relevant non-protected materials can be identified and distributed as discovery to these defendants and other affected parties.

¹ Attorney-client includes other members of the defense team, including investigators, paralegals, interpreters, and expert service providers.

Primary Areas of Inquiry:

- A. Review portions of video surveillance, other than the video of the attorney-client rooms² designated on DVR No. 6, to determine whether they contain privileged or confidential information.³
- B. Determine whether audio recordings of the attorney-client visitation room were made and whether those recordings are included with the video surveillance or other materials requested or obtained by the United States Attorney's Office for the District of Kansas (USAO).⁴
- C. Review recordings of telephone calls, or conduct searches by attorney phone numbers, to determine which calls are between a client and his or her attorney.
- D. Determine what, if any, steps were taken by pretrial holding facilities to protect confidential audio communications, such as blocking certain phone numbers or warning callers, and whether those measures were communicated to either the clients or their attorneys.
- E. Review the computers, seized from the law library at CCA, to determine whether they contain attorney-client privileged or confidential information.
- F. Determine how the relevant non-protected information can be excised from the video recordings, the audio recordings, and the law library computers, so that any non-protected materials can be distributed as discovery in this and other cases.

² The surveillance video of the attorney-client visitation rooms contains confidential non-verbal communication and will not be viewed by, or provided to, any party other than the Special Master, without demonstration to this Court that the materials are not protected and are relevant to material issues in this case.

³ The volume of video recordings prohibits review of all of the footage for determination of these issues. The Special Master has authority to review any material, but is not expected to review or categorize all video recordings filed inder "Attorney Room" and "Attorney Room 4-7" on Disc 6.

⁴ USAO shall include all attorneys employed by the District of Kansas USAO; all federal, state, and task force agents working with the USAO; and all other employees of the USAO, including IT, paralegals, and other staff.

- G. Determine whether any other protected communications, such as legal mail or videoconferencing, were recorded by the pretrial holding facilities or obtained by the USAO.

Objective Two:

To determine how the USAO came into possession of protected materials, including those identified in Objective One, and determine any policy or practice related to obtaining protected materials. This should include identifying any specific cases or specific government attorneys or agents who have obtained protected material.

Primary Areas of Inquiry:

- A. Determine the prior policy and practices of pretrial holding facilities under contract with the United States Marshal Service with regard to video recording or audio recording protected communications.
- B. Identify past occasions when CCA, or other contract pretrial holding facilities, have made available to the government or any law enforcement agency video or audio recordings of protected communications.
- C. Determine whether the USAO has intentionally sought production, formally or informally, of any protected communication from pretrial holding facilities for use in an investigation, grand jury proceedings, or prosecution, and by what means.
- D. Determine whether the USAO has inadvertently come into possession of protected materials from any contract pretrial holding facility and whether appropriate remedial or protective measures were taken to notify the parties and protect the security of the communications.
- E. Determine whether and how the USAO or its agents have used or attempted to use protected material in any investigation, grand jury proceedings, or litigation, whether or not it was disclosed to the Court or to the parties. This should include any attempts to interfere with the attorney-client relationship, such as requesting attorney fees or alleging conflicts of interest.

Objective Three:

To report to the Court the parties affected by any breaches of privilege, confidence, Constitutional rights, statutory rights, or ethical obligations, and to recommend available remedies, in this case or others, if any are appropriate.

Primary Areas of Inquiry:

- A. Identify by using the visitation logs and other facility records the attorneys and clients who met during the time span covered by the video recordings of protected meetings in this case, or any other case involving USAO possession of protected material discovered during this inquiry.
- B. Identify the attorneys and clients who communicated by phone or videoconferencing during the time span covered by the audio recordings in this case, or any other case involving USAO possession of protected material discovered during this inquiry.
- C. Recommend possible remedies that might be available to parties affected by identified breaches of privilege, Constitutional right, statutory rights, or ethical obligations.

Authority, Powers, and Responsibilities of the Special Master

The Court grants to the Special Master the following authority, powers, and responsibilities:

- A. Communicate, ex parte, with parties and attorneys to facilitate scheduling matters, to make informal suggestions to the parties to facilitate compliance with Orders of the Court; and as necessary to permit the full and efficient performance of the master's duties;
- B. Issue subpoenas for the production of documents or taking of testimony on the record;
- C. Inspect and copy files, documents, communication, and electronic data of any pretrial holding facility, the United States Marshal Service, and the USAO as necessary to complete the state objectives of the inquiry;
- D. Retain the services of experts, consultants, or advisors for specialized tasks, such as computer analysis;
- E. Obtain privileged information from counsel without the disclosure constituting a waiver of the attorney-client privilege;⁵
- F. Impose sanctions, other than contempt, against a uncooperative party or non-party, and may recommend contempt sanctions against a party or non-party.
- G. The Special Master will be compensated at a rate of \$ _____ per hours, and shall be reimbursed for all reasonable expenses. The Special Master's fee and other costs shall be borne by _____. The Special Master shall submit periodic itemized statement of fees and expenses to _____.
- H. The Special Master shall proceed with all reasonable diligence and to keep the Court apprised of progress and an anticipated time line toward completion of the appointment.
- I. Upon consultation with the Court, the Court may Order the Special Master to expand the inquiry beyond the Objectives listed above, as necessary and appropriate.

⁵ Kansas Rules of Professional Conduct 1.6.

Access to the Special Master's Findings

The parties shall file with the Clerk, under seal, all papers for consideration by the Special Master. The Special Master shall also file with the Clerk, under seal, all reports or other communications with the Undersigned Court. At the conclusion of the Special Master's inquiry, the Court shall, at its discretion, make available to the parties any findings and recommendations of the Special Master. The Court will maintain the confidentiality of any protected material, unless prior notice and opportunity to object has been provided to the affected party.

Any party seeking review of any ruling of the Special Master shall comply with the requirements of Fed. R. Civ. P. 53(f). Any party may object to any Order or Report by filing such objection with the Court within seven days of the issuance of the Order or Report. Any response to such objection must be within seven days of the objection. The Court will determine whether, based on the reasons provided in the party's objection, it is appropriate to review the Special Master's Orders or Report under a *de novo* or other appropriate standard, and whether the objection should be sustained or denied.

The Court appoints _____ as Special Master.

IT IS SO ORDERED.

Dated this ___ day of August, 2016

Judge Julie A. Robinson
U.S. District Court Judge