

1 APPEARANCES:

2 (Continued)

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1 (1:38 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, please.

6 MR. SLINKARD: Good afternoon, Your Honor.
7 May it please the Court. The government appears by
8 Duston Slinkard, Debra Barnett, Christopher Oakley, and
9 Erin Tomasic.

10 THE COURT: All right. Defendants.

11 MR. GUASTELLO: May it please the Court.
12 David Guastello on behalf of Karl Carter, who has waived
13 his appearance for purposes of today.

14 MS. DODGE: Cynthia Dodge on behalf of David
15 Bishop, who appears in person.

16 MR. JACKSON: Your Honor, Catherine Rowlette
17 appears in person and by counsel, Mike Jackson, if it
18 please the Court.

19 MS. AMBROSIO: Your Honor, Ms. Tackett does
20 not appear, but appears by counsel, Kathleen Ambrosio.
21 She has filed a waiver of appearance, Your Honor.

22 MR. HOFFMAN: Mr. Aiono appears by and
23 through counsel, Jason Hoffman, Your Honor.

24 THE COURT: All right.

25 MS. BRANNON: Federal Public Defender

1 appears through Branden Bell, Kirk Redmond, and Melody
2 Brannon.

3 THE COURT: All right. All right.

4 MR. LAURANS: Your Honor?

5 THE COURT: Yes.

6 MR. LAURANS: Interested party David Lougee
7 appears by John Laurans.

8 THE COURT: All right. As you know, we've
9 had two hearings on these matters concerning the CCA
10 video and now audio-recordings and related issues to
11 that. And I indicated that I intended to appoint a
12 special master in view of these many issues and
13 complicated issues and serious issues surrounding the
14 Sixth Amendment and other constitutional and perhaps
15 statutory concerns. And so I had that under advisement.

16 But as part of the process of this and
17 during the two hearings, I've obviously received
18 evidence in the form of affidavits and other exhibits
19 that were admitted into evidence. To date I did not
20 feel like I had a number of questions that needed to be
21 answered answered. And a lot of these questions are
22 directed to the U.S. Attorney's Office because obviously
23 they're the prosecutors and were involved with the
24 investigation, conducted the investigation.

25 And so I decided that I needed a number of

1 questions answered, and so that's why I called the
2 hearing today. I directed certain prosecutors to be
3 here, the ones that are involved and actually are
4 counsel of record in this investigation. That would be
5 Ms. Tomasic, Mr. Oakley. And also directed other
6 counsel of record, which is why Mr. Slinkard is here and
7 Ms. Barnett is here. And I think I directed
8 specifically Kim Flannigan to be here because her name--
9 although she's not counsel of record, her name comes up
10 in a number of the factual assertions made by both the
11 government and the defense. And I wanted people here
12 that could answer the questions.

13 At the prior hearings, for example, Ms.
14 Barnett was here and she's not-- she was not involved in
15 the matters underlying this case and could not answer a
16 number of the questions that I had. Since then and in
17 going through the materials, I've developed a number of
18 other questions that I knew that Ms. Barnett at least
19 didn't have personal knowledge of. And so that's why I
20 directed particular people to be here.

21 So since the filing of the last-- since the
22 time of the last hearing, the parties have filed briefs.
23 One of the concerns of the government at both of the
24 last hearings is that I called these hearings on short
25 notice. You'll recall that I considered the August 9th

1 hearing an emergency hearing in view of the serious
2 allegations about recordings of attorney-client meetings
3 at CCA and I felt like something needed to be done
4 immediately. And the government expressed concern about
5 not being able to respond to filings by the FPD and
6 others before that hearing and before the following
7 hearing.

8 Now, though, everyone has had plenty of
9 opportunity and everyone has taken the opportunity to
10 file a number of things. So in addition to the record
11 that is already part of the record from the two prior
12 hearings, I since that time have received the-- a reply
13 to the government's recommendation related to the scope
14 of the special master, which was Document 120. And the
15 government's response to motion to impound evidence,
16 which was Document 121. I don't recall if those two
17 documents from the government were filed before the last
18 hearing, but obviously I have Document 120, 121 from the
19 government, their recommendation related to the scope of
20 special master and their response to the motion to
21 impound evidence.

22 And then Document 130, I now have the
23 defense reply to that. That was filed on September 2nd.
24 And I also have a supplement to the reply, which the
25 defense filed on September 6th. And then I have the

1 government's supplemental memorandum in support of
2 proposed order to appoint a special master and offer to
3 present evidence. That was filed late last night about
4 10:55 p.m., Document 133, last night. I have reviewed
5 that document extensively, even though it was filed last
6 night.

7 So those are the additional submissions.
8 The parties have included a number of factual
9 assertions. They've briefed a number of the issues that
10 have been raised by one or the other or raised through
11 things I might've said or questions-- questioned at the
12 last hearing. So those are the pleadings and those are
13 all incorporated into the record on these issues.

14 As I said, I do have a number of questions
15 and I want answers from people that have personal
16 knowledge of the matters that I'm inquiring about.

17 So the way I intend to proceed today is
18 starting with the questions, and they're somewhat
19 extensive, but it may go rather quickly, I don't know.
20 The government's latest submission filed last night
21 answers some of these questions, it doesn't answer all
22 of my questions. And based on the government's brief, I
23 feel like there may be some questions that need some
24 clarification, so I intend to ask questions for that
25 reason.

1 The government's response filed last night
2 indicates an offer to present evidence. So after I ask
3 the questions, the next thing I'd like to see happen is
4 the government present any additional evidence it has,
5 whether that's by witness or proffer or declaration or
6 affidavit, or whatever the case may be, that whatever
7 form it's in, I will receive that into evidence as part
8 of the record.

9 I don't know if the defense has any
10 additional evidence to offer in any of those formats,
11 but if you do, now would be the time. My intent at the
12 end of today's hearing is to consider the record closed
13 and everything is under advisement at that point. And I
14 do intend to appoint a special master or perhaps a
15 neutral expert to-- to assist the Court in a number of
16 things, which I'll address and go into that with you
17 later on and just to-- I know that there's a difference
18 in terms of the scope of what you think that person
19 should accomplish. And I may have questions both of the
20 defense and the government about that. And then there
21 are some other miscellaneous matters I'd like to bring
22 to the-- to the parties' attention as well.

23 All right. So if we start with the
24 questions, and I don't know if there's a particular
25 person that needs to take the lead on this. These are

1 all directed to the government. Again, I may have
2 additional questions of the defense later, but I simply
3 would like whoever wants to answer these questions.

4 So is there a plan of action, Ms. Barnett,
5 in terms of who's going to answer questions at this
6 point?

7 MS. BARNETT: Your Honor, I don't mean to be
8 vague, but I think it will just depend upon the Court's
9 question and who we feel has the-- the most in depth
10 information to provide a complete answer to the Court on
11 that issue. So I guess we might ask the Court to maybe
12 just give us the question and then whoever can best
13 respond to it will do so, if that's okay.

14 THE COURT: That's fine. But let me ask you
15 something else because, as you know, there are a number
16 of allegations made in this case, allegations of
17 misconduct, allegations of Sixth Amendment violations,
18 not only by CCA, but there are allegations directed at
19 the U.S. Attorney's Office as well; Sixth Amendment,
20 6(e), ethical, whatever. A number of categories.

21 Have you all followed the Department of
22 Justice procedure in terms of seeking counsel about how
23 to proceed? So, for example, a number of the
24 allegations are probably directed at Ms. Tomasic,
25 perhaps at others. Ms. Tomasic is still counsel of

1 record. And so I just wonder if you followed any
2 procedures in terms of how to handle that at this point.

3 MS. BARNETT: Yes. We've consulted
4 internally with the appropriate personnel that we would
5 need to consult in terms of basically Ms. Tomasic or Mr.
6 Oakley answering the Court's questions about what
7 occurred.

8 THE COURT: All right. And so at this point
9 your intention, your office's intention is that Ms.
10 Tomasic, Mr. Oakley, whoever is counsel of record, will
11 remain counsel of record throughout this case?

12 MS. BARNETT: Yes.

13 THE COURT: All right. Understanding that,
14 at least with respect to these issues, they're perhaps -
15 and particularly Ms. Tomasic - key witnesses on-- or at
16 least providing facts that the Court deems necessary to
17 determine the scope of what the special master or expert
18 ought to do?

19 MS. BARNETT: Yes.

20 THE COURT: Okay. All right. Okay. So my
21 first question is, at what point did the government come
22 to know that the video-recordings included
23 attorney-client communications? At what point, point in
24 time did the government come to know that the
25 video-recordings included attorney-client

1 communications, attorney-client visitations?

2 MS. TOMASIC: Your Honor, would you like me
3 to approach the podium or just answer in place?

4 THE COURT: Well, yeah, that would probably
5 be better. We could hear you better. I realize there's
6 going to be a lot of movement back and forth. You could
7 stay at the podium and then if there's something Mr.
8 Oakley or somebody else needs to come forward for, maybe
9 that's the way to proceed, so... all right.

10 MS. TOMASIC: Okay, Your Honor. It's a
11 complicated question because no-- the government had a
12 good-faith basis to believe that the CCA
13 video-recordings contained attorney-client meetings at
14 the time the issue-- the subpoena was issued. I did not
15 recognize that. I did not think about it. I did not
16 consider it until July-- either on the eve of the
17 hearing or in response to the Court's questioning at the
18 time of the hearing. I don't remember the exact moment.

19 It could've been possibly one of two things
20 triggered my memory; the concerns about Richard
21 Dertinger obtaining information through his attorney at
22 any attorney-client room may have spurred, oh, I think
23 we probably have that, given what I know based on what
24 the cooperator says, and I got all surveillance footage,
25 or in response to the Court's questioning at the time of

1 the hearing when I answered that we had it, that spurred
2 me to think, yes, we do have it. And in response to
3 that, I talked to the agent.

4 THE COURT: Are you talking about the
5 July 21 hearing?

6 MS. TOMASIC: Yes, Your Honor.

7 THE COURT: So when you spoke of the
8 subpoena, the subpoena for video-recordings, that was
9 issued in April?

10 MS. TOMASIC: Yes, Your Honor.

11 THE COURT: And you had some indication then
12 that there might be? Was that based on the informant's
13 information?

14 MS. TOMASIC: Yes, Your Honor, only on the
15 informant's information. And so to clarify; the
16 informant provided that information as-- as was set
17 forth in the briefing in discussing how to set up a
18 controlled buy. His proffer was very lengthy, he
19 provided an overwhelming amount of evidence or, excuse
20 me, information.

21 So when the subpoena was issued, in an
22 attempt to get all of the surveillance footage that we
23 thought we need or could need in the future, it was
24 broadly drafted, but not intended in any way to get
25 attorney-client video-recordings. And I should have

1 recognized at that time that it may include
2 attorney-client meetings, but I just didn't recognize it
3 and didn't contemplate it until July-- either on the eve
4 of the July 21st hearing or at the July 21st hearing.

5 THE COURT: So in other words, before the
6 July-- shortly before the July 21st hearing or during
7 the July 21st hearing when I posed a question about "are
8 there recordings," we were talking about the scope of
9 the recordings in the facility, and I said in I think
10 medical rooms and attorney-client rooms. At that point
11 that triggered in you something that you thought there
12 might be a problem?

13 MS. TOMASIC: Yes.

14 THE COURT: Okay. Your communications with
15 Ms. Rokusek, which I believe began on August 1,
16 concerning Mr. Dertinger and the proffer and all of
17 that.

18 MS. TOMASIC: Uh-huh.

19 THE COURT: When was the first communication
20 you had with Ms. Rokusek concerning the potential
21 conflict issue with her?

22 MS. TOMASIC: Ms. Flannigan sent her an
23 e-mail the previous Friday and then again on Monday, but
24 she didn't get it. I believe with certainty the meeting
25 was on August 2nd, 2016.

1 THE COURT: All right. And at the time of
2 that e-mail, were you aware that there were
3 attorney-client communications included in the
4 recordings?

5 MS. TOMASIC: The e-mail wasn't issued by
6 me, it was by Ms. Flannigan. And during the meeting,
7 again, I was relying solely on the cooperator's
8 information. I didn't state that we had them during the
9 meeting, what I said is the agent is locating them,
10 locating attorney-client meetings.

11 THE COURT: So you had some idea that there
12 were attorney-client meetings if you had an agent
13 looking to locate them.

14 MS. TOMASIC: What I said to the agent
15 either on the eve of the July 21st hearing or after the
16 July 21st hearing is, "I need you to look at this video
17 of Mr. Dertinger leaving his meeting with Ms. Rokusek
18 and look for everyone's reaction when he gets back into
19 the pod." Because our understanding, based on what the
20 cooperator said, was-- is that Mr. Dertinger passed this
21 information along to other inmates in his pod after his
22 meeting with Ms. Rokusek and that everyone freaked out,
23 that certain inmates were upset and dropped out of the
24 conspiracy, that there was a lot of scuttlebutt about
25 the fact that they were being investigated.

1 And we knew from having listened to-- the
2 agents knew from having listened to recorded inmate
3 calls that at some point prior to the search warrant,
4 inmates had found out that they were being investigated
5 and were taking measures to try and avoid law
6 enforcement's detection. For example, they previously
7 were sending wire transfers between the individuals on
8 the outside to pay for the contraband that was passed
9 between inmates on the inside, and at a certain point a
10 leader/organizer in the organization instructed the
11 person on the outside handling that to no longer use
12 wire transfers, to just do in-person exchanges. And I
13 think the inference was that things were hot right now
14 and that-- and the agents identified that as a concern,
15 that somehow the inmates had learned about the
16 investigation.

17 THE COURT: All right. So the July 21
18 hearing, you did know by then that there were
19 attorney-client recordings in the attorney-client rooms?

20 MS. TOMASIC: When I made that
21 representation on July 21st at the hearing and on
22 August 2nd to Ms. Rokusek that we were locating them, I
23 was relying solely on the cooperator's information. And
24 in my mind, I was not distinguishing between monitoring
25 versus recording. The inmate indicated that he knew the

1 attorney rooms were being recorded, I-- presumably
2 because he saw a camera in there. And it made sense to
3 me that if there's a camera in there, that they're
4 recording. I didn't even contemplate that they could be
5 monitored but not recorded. And I had no reason to
6 doubt his statement because there was really no reason
7 to lie.

8 Our concern way back in March, early March
9 when he provided that information was, if we were going
10 to do a controlled buy, he needed to be under
11 surveillance the entire time for his safety and also so
12 that we could verify who he bought the drugs from inside
13 CCA and that he didn't have an opportunity to get them
14 from someone else for chain of custody purposes for
15 making a case against his source of supply.

16 So my concern and the agents' concern in
17 speaking with this cooperator was: Are you going to be
18 under surveillance the whole time, are you going to be
19 recorded the whole time, because we can't do this buy,
20 DOJ won't let us do this buy if you're not being
21 recorded the whole time.

22 THE COURT: Well, did you contemplate he was
23 going to go into an attorney-client room during the--
24 the controlled buy?

25 MS. TOMASIC: Yes, Your Honor. The plan was

1 that he was going to obtain the drugs from his-- well,
2 the entire plan was that an agent was going to put buy
3 money on his source of supply's books, and then the
4 source of supply was going to release the drugs or
5 contraband, I believe it was K2 and I think
6 methamphetamine he was going to purchase. And then to
7 get the drugs out of the facility, we were-- were going
8 to pre-arrange an attorney-client meeting and we were
9 going to have an undercover female agent act as the
10 attorney's paralegal and she was going to go with the
11 attorney into the attorney-client meeting and take
12 custody of the drugs so that the attorney wasn't in the
13 chain of custody.

14 THE COURT: And you intended to have that
15 recorded?

16 MS. TOMASIC: If, in fact-- yes, that's what
17 we intended to do, if he was going to be under
18 surveillance the whole time, yes.

19 THE COURT: So at that point you did know
20 that he could be-- you could record what went on in the
21 attorney-client room?

22 MS. TOMASIC: Based on what he believed,
23 yes, Your Honor.

24 THE COURT: So you're telling me that you
25 set up a controlled buy with an understanding that you

1 could completely control it by recording a transaction
2 involving, you know, the so-called sort of undercover
3 agent that happened in the attorney-client room, you
4 intended to proceed in that way based solely on what he
5 told you? You took no measures to determine if, in
6 fact, you could record in that room?

7 MS. TOMASIC: That was the initial steps and
8 that was the discussion with him. The controlled buy
9 was abandoned before it ever got off the ground because
10 we deemed it was too dangerous because there couldn't be
11 agents inside the facility to be near him if, in fact,
12 his life was put in danger. And we didn't know who we
13 trusted inside CCA at that point to act on behalf of the
14 agents to intervene and-- and keep him safe during the
15 controlled buy.

16 So we discussed the controlled buy during
17 the initial meeting with this inmate. We sought
18 approval at a certain point from DOJ for the controlled
19 buy and then immediately DOJ said no, it's too
20 dangerous.

21 THE COURT: All right. So by August 5, what
22 was your knowledge with respect to the video-recording
23 of attorney-client rooms?

24 MS. TOMASIC: Is August 5 a Friday?

25 THE COURT: Let's see.

1 MS. TOMASIC: I believe it is.

2 THE COURT: Well, I don't have that with me.

3 MR. SLINKARD: Yes.

4 THE COURT: It is? It's a Friday. All
5 right. August 5.

6 MS. TOMASIC: By August 5th, Ms. Rokusek in
7 the afternoon came in to view the video. And she met
8 with Pauletta Boyd and was viewing the video, and I
9 don't know exactly what time she came in. When she
10 left, I assume she reported it to the FPD that the
11 video, in fact, existed. And then they told my
12 supervisor and my supervisor told me. That's how I
13 learned that the video existed.

14 Between Wednesday and Friday, my concern was
15 that I had made a misrepresentation to the Court during
16 the July 21st hearing because I had made a clear
17 representation that we had it based solely on a
18 cooperator statement. And in discussions with people
19 much more experienced than me, I came to the conclusion
20 that that was foolish.

21 THE COURT: You made a-- I'm not
22 understanding. On the-- at the July 21 hearing, you
23 made a clear representation of what?

24 MS. TOMASIC: That the government-- that the
25 CCA video-recordings included attorney-client

1 video-recordings based on what the cooperator had told
2 me. Not that I had seen it myself, not that I viewed
3 the index. I didn't view the index until most likely
4 late afternoon on Friday, August 5th, but certainly not
5 before I met with Ms. Rokusek and certainly not before
6 the July 21st hearing.

7 THE COURT: That July 21st transcript, that
8 hearing is in evidence. I think it was in evidence at
9 the August 9th emergency hearing. Have you reviewed
10 that transcript?

11 MS. TOMASIC: Yes, Your Honor.

12 THE COURT: All right. The index of the
13 video-recordings, who made the index?

14 MS. TOMASIC: CCA made the index. I only
15 knew and learned at the August 9th hearing, which I was
16 instructed not to come to, so I had to wait until the
17 transcript came out to see what happened at the
18 August 9th hearing. In that I read the transcript and
19 saw that it was an issue who created the index. And I
20 spoke with Ms. Boyd and said, "Who created the index?"
21 And Ms. Boyd said, "I did not create the index. They're
22 acting like I created the index. CCA created the
23 index."

24 Since that time, I've spoken with Ms. Boyd
25 about that index in much more detail and she explained

1 this, that-- I asked her to get an index because the
2 defense attorneys wanted an index and I also thought an
3 index would be needed to view the video. She met with
4 Matt Cahill, who's a retired Deputy U.S. Marshal, and he
5 put her in contact with Ken Lajiness at CCA. Ken
6 Lajiness was actually at the courthouse in the marshals
7 service office the next day training a new employee, who
8 was a contract employee for CCA. Marshal Cahill got Ms.
9 Boyd, took her down there to meet with Mr. Lajiness.
10 She said she needed it and he said, "I'll get it to you
11 the next day," and then he e-mailed that to her. I have
12 the e-mail and we have it ready to admit into evidence
13 showing that CCA provided the index.

14 I never asked to see the index until after I
15 learned through my supervisor, Deb Barnett, that the FPD
16 was concerned that I had misrepresented to the Court on
17 July 21st that the government had attorney-client
18 footage and also misrepresented, according to the FPD,
19 to Ms. Rokusek that we had attorney-client footage. So
20 I asked to see the index, and the index showed that
21 there were attorney-client rooms.

22 THE COURT: So the first time you saw the
23 index was when?

24 MS. TOMASIC: I don't know the exact date.
25 It was either Thursday, August 4th, or Friday,

1 August 5th. I believe it was in the late afternoon on
2 Friday, August 5th.

3 THE COURT: I thought the index came to you
4 sometime in June.

5 MS. TOMASIC: It came directly to Ms. Boyd
6 and I never saw it.

7 THE COURT: But you were in the process of
8 disseminating information, but you didn't bother to look
9 at the index?

10 MS. TOMASIC: The surveillance footage-- as
11 the Court knows based on the July 21st hearing, the
12 volume of discovery in this case is overwhelming. And
13 so the surveillance footage was on the back burner in my
14 mind because we didn't have the drives yet. And I knew
15 once we got the drives, it was going to take 20 days to
16 copy them. So my goal was to get out what we had and
17 what was ready and what we could provide to them first.
18 And then once we got the drives, to move forward with
19 addressing that.

20 THE COURT: All right. In your latest
21 submission filed yesterday, it seems that you-- the
22 government agrees that the audio-recordings should be
23 subject to review by the special master or expert; is
24 this correct?

25 MS. TOMASIC: That's correct.

1 THE COURT: Okay. To your knowledge, in all
2 instances where inmate attorney calls have been
3 recorded, have these inmates been notified of the
4 recordings?

5 MS. TOMASIC: Prior to the August 9th
6 hearing, the only instance I knew where an agent had
7 encountered attorney-client video-- or excuse me,
8 attorney-client recordings, audio-recordings, inmate
9 calls, he told me, I immediately contacted our
10 professional responsibility point of contract. He
11 e-mailed PRAO. PRAO gave an advisory opinion.

12 And then in further discussion with our
13 professional responsibility point of contact, I e-mailed
14 the attorney, let him know we had encountered them, let
15 him know that an agent had inadvertently listened to
16 between 10 and 15 seconds and that we did not intend to
17 listen to them anymore. And I have in evidence-- the
18 government can admit that e-mail to the defense attorney
19 that was sent as part of this investigation.

20 THE COURT: All right. I would suggest at
21 the close of all of these questions-- I assume you have
22 these marked. And what I'll have you do is just
23 describe them by exhibit number and I'll admit all of
24 that for the record.

25 Have the inmates been given an opportunity

1 to assert their privilege?

2 MS. TOMASIC: Could you clarify that point?

3 THE COURT: Well, if they're not notified
4 that the recordings exist, when have they had an
5 opportunity to assert their privilege with respect to
6 those recordings?

7 MS. TOMASIC: The only inmate-attorney call
8 that I was aware was encountered, I notified the
9 attorney immediately. After this issue has arisen, I've
10 spoken with all the agents who listened to calls in this
11 case, and they did state that they had encountered some
12 additional attorney calls, did not listen to them,
13 minimized immediately. But neither Chris Oakley nor I
14 were ever told about those particular calls, because an
15 agent other than Jeff Stokes is the one who encountered
16 the calls and they used a different procedure.

17 THE COURT: So how is it that you came--
18 you, the U.S. Attorney's Office or your investigative
19 agents, how did you come in the possession of the
20 audio-recordings from CCA to begin with?

21 MS. TOMASIC: There was a subpoena issued in
22 April that the government also has and can admit. But
23 it is a grand jury subpoena, so we would request to
24 admit it under seal.

25 THE COURT: This is for the audio, not the

1 video.

2 MS. TOMASIC: Yes, Your Honor.

3 THE COURT: So you used a grand jury
4 subpoena for the audio-recordings, just like you did for
5 the video-recordings?

6 MS. TOMASIC: Initially. And a number of
7 inmates were identified, along with a number of phone
8 numbers in that subpoena. At a later date, Marshal
9 Cahill contacted CCA after the agents recognized that
10 the conspiracy was much longer in duration than we
11 initially anticipated. Initially we thought the
12 conspiracy was from October, 2015 moving forward.

13 At a certain point in the investigation,
14 Marshal Cahill and the other agents involved recognized
15 that the conspiracy spanned several years. And so he
16 contacted CCA and-- an employee of CCA and requested
17 those phone calls pursuant to the marshal's contract,
18 without a subpoena, and got-- a number of those calls
19 were the exact same calls that were initially produced,
20 but he got a larger time span.

21 THE COURT: All right. So the-- but the
22 subpoena-- and I think the subpoena should be put into
23 evidence, just like the other one was for the video, but
24 it starts sometime in 2015 and goes forward through the
25 date of the subpoena for the audio-recordings?

1 MS. TOMASIC: That's my recollection, Your
2 Honor, yes.

3 THE COURT: But then the marshals service
4 supplemented that request in some sort of oral way or is
5 there some written memorandum or something, what they
6 requested beyond the-- the parameters of the subpoena?

7 MS. TOMASIC: It would've been either
8 through an e-mail or a phone call.

9 THE COURT: But you don't have an e-mail or
10 any other written records at this point?

11 MS. TOMASIC: No. And I am not certain,
12 because Marshal Cahill has retired, whether he can
13 access his old e-mails, but I can check with him.

14 THE COURT: And so is the subpoena directed
15 to CCA or is it directed to Securus?

16 MS. TOMASIC: To CCA.

17 THE COURT: Okay. So how is it that the
18 audio-recordings include, for example, attorney-client
19 calls between Jackie Rokusek and her client, Virok Webb,
20 that date back to 2011?

21 MS. TOMASIC: The request made by Marshal
22 Cahill was for all inmates during the entire duration of
23 their time at CCA. So if-- if 2011 is when the phone
24 call with Ms. Rokusek and Virok Webb was intercepted, it
25 appears as though he had been at CCA for some time,

1 which is highly unusual to be at CCA that length of--
2 period of time. I would have to check into that.

3 THE COURT: Well, I'm not understanding you.
4 So Virok Webb I can tell you, because I sentenced him,
5 and I believe it was in 2011, he wasn't at CCA in 2015
6 or 2014 or 2016. So I'm not understanding how his calls
7 get caught up in this subpoena.

8 MS. TOMASIC: Okay. I'm not aware of the
9 time that he was at CCA. What Marshal Cahill did is he
10 provided a list of targets and also not necessarily
11 targets--

12 (Government counsel confer).

13 MS. TOMASIC: Oh, okay. Thank you. This is
14 a Topeka case, and Mr. Slinkard just helped me to
15 understand the connection.

16 And then also, Your Honor, I do have a
17 question. I know Virok Webb's name is already on the
18 record. The government's-- upon our review of the 6(e)
19 parameters, I don't necessarily want to outline the
20 particular 40 inmates whose calls were obtained pursuant
21 to the grand jury subpoena and then also through Marshal
22 Cahill, because many of them are unindicted
23 co-conspirators and we would be putting it in the public
24 forum - and I know the press is perhaps here, too - that
25 they are potentially targets of an ongoing

1 investigation.

2 THE COURT: All right. But what you're
3 telling me is that Virok Webb was-- that the subpoena of
4 those calls related to the overall investigation?

5 MS. TOMASIC: Yes, Your Honor. There is a
6 person who was previously identified for the
7 leader/organizer of this present conspiracy, had an
8 overlapping role as a leader/organizer of the
9 conspiracy, who was at CCA for an extended period of
10 time. And so without knowing more and speaking to the
11 agents, Virok Webb was either a co-conspirator to this
12 person, given the time frame and the connection I just
13 became aware of, or this leader/organizer was using
14 Virok Webb's PIN to place outgoing calls in an attempt
15 to avoid law enforcement detection. And that is
16 something that we encountered repeatedly in the course
17 of this investigation.

18 THE COURT: All right. And the
19 audio-recordings, when did you first learn that there--
20 included attorney-client calls?

21 MS. TOMASIC: I'd have to look at the
22 e-mail. But in January or February, I believe, Agent
23 Stokes contacted me and said, "I encountered an
24 attorney-client call. I inadvertently listened to
25 between 10 and 15 seconds, because he did not identify

1 himself as an attorney immediately." And at that point
2 I contacted PRAO, and then e-mailed the attorney and
3 notified him.

4 THE COURT: All right.

5 MS. TOMASIC: And that is--

6 THE COURT: Did anyone have any
7 conversations at CCA-- with CCA at that point about the
8 fact that an attorney-client call had been identified as
9 being recorded?

10 MS. TOMASIC: No, Your Honor. I was aware
11 of the procedures that CCA could block, and so I just--
12 block attorney calls. And I didn't know who initiated
13 the block, an inmate or an attorney, but I just believed
14 that the attorney had failed to do so and he would do so
15 at that point.

16 In fact, I'd have to grab his e-mail, but I
17 believe he indicated he was going to contact CCA and
18 follow up. And in the e-mail he also indicated that he
19 typically places-- it might help if I get the e-mail
20 because my memory is not clear, but he did mention
21 something about CCA's procedures and that he didn't
22 intend for the call to be recorded.

23 THE COURT: Okay. If you-- if one of your
24 colleagues can find that, that's fine.

25 MS. TOMASIC: In response to my e-mail, the

1 attorney e-mailed, "Thank you for alerting me to this
2 fact. I typically use the jail lines for scheduling
3 only, but I do appreciate you discontinuing the calls
4 when Stokes realized that they were attorney-client.
5 Sometimes these calls are initiated by my letter to CCA.
6 And when done so, CCA should route the call through a
7 privileged line, such as a case worker's. I will
8 contact CCA to ensure that they do not error in any such
9 instance." And that e-mail exchange took place on
10 January 22nd, 2016.

11 THE COURT: All right. In this case, in the
12 Lorenzo Black case, when did you or have you started-- I
13 think you have. When did you disseminate the
14 audio-recordings?

15 MS. TOMASIC: It was in-- it was Round 2a,
16 and it was in late July, 2016.

17 THE COURT: And to whom did you disseminate
18 them?

19 MS. TOMASIC: To counsel of record at that
20 point I believe.

21 THE COURT: And so I take it from what I've
22 heard thus far, there was no attempt to separate these
23 recordings in a way that one counsel would not discover
24 the attorney-client conversation of another counsel?

25 MS. TOMASIC: Other than the phone calls

1 that relate to this e-mail to this particular attorney,
2 I was unaware that there were any other attorney-client
3 calls. And AUSA Oakley was unaware that there were any
4 other attorney-client calls among any of these 40
5 inmates. It was only brought to our attention at the
6 August-- the second hearing, which I think was August
7 16th.

8 THE COURT: All right. So tell me what
9 measures have been taken to date to gather, to secure,
10 to impound, and surrender the audio-recordings, as well
11 as the video-recordings to the Court.

12 MS. TOMASIC: When the Court-- I was not
13 involved in anything to do with handling the
14 video-recordings once the Court became involved. I
15 believe Ms. Barnett and Mr. Slinkard handled that, so I
16 can't speak to that.

17 With respect to the audio-recordings, Mr.
18 Oakley and I-- he initiated an e-mail to all agents. I
19 had verbal communications with all agents and said,
20 you're the case agents for these particular agencies
21 involved - there are four agencies involved - find out
22 exactly who had access to the calls, get all the calls
23 back, and we have to do so by... and I provided the date
24 by which we had to comply.

25 And based on that, the-- the agents, the

1 case agents took it upon themselves to work in their own
2 agency to get all of those calls back and all of the
3 notes back from the agencies.

4 THE COURT: All right. So when you provided
5 these materials pursuant to the impound order to me on
6 August 25th, you submitted a cover letter that explained
7 the efforts and-- but also mentioned that these things,
8 these recordings, still resided on the server in the
9 U.S. Attorney's Office and also some servers of
10 investigative agencies?

11 MS. TOMASIC: Not the calls, Your Honor.
12 And if the letter says so, it's an error. The
13 derivative reports. So all of the calls were deleted
14 off the agency servers and all the calls were deleted
15 off of the U.S. Attorney's Office server. And what we
16 did is we copied the calls onto a thumb drive, provided
17 that to the Court, and then deleted it off the U.S.
18 Attorney's Office server.

19 What is still on the agency server and on
20 our server are-- is the derivative information in the
21 form of reports, which would not contain any information
22 about attorney-client calls. It's just reports. For
23 example, Marshal Cahill recapped the pertinent phone
24 calls that he encountered, pertinent to the
25 investigation. So there's no attorney-client

1 information, it's just he generated a report talking
2 about on Phone Call 35 this is what's pertinent to the
3 investigation.

4 And then also, there would be derivative
5 information in various affidavits that have been
6 submitted to the Court, for example, search warrant
7 affidavits. But again, there would be no
8 attorney-client information on those.

9 THE COURT: So they're not-- they're
10 derivative of calls, but not derivative of
11 attorney-client calls.

12 MS. TOMASIC: That's correct. There is no
13 derivative information of attorney-client calls, period.
14 It's just that the order was broadly drafted and we
15 wanted to be sure that we complied. The only -
16 quote/unquote - potentially derivative information would
17 be, for example, in Marshal Cahill's notes, he had a
18 call-- he had one line that said, "Attorney call.
19 Didn't listen."

20 THE COURT: All right. What matters are
21 currently in the hands of the Taint Team?

22 MS. TOMASIC: Ms. Treadway, who is the Taint
23 attorney, would be in a better position to answer that
24 than me. My quick answer would be nothing, because the
25 law library computers have been imaged, but the Taint

1 Team was not going to be given that information until
2 the parties in this case came to an agreement about the
3 search terms that would be used to ferret out potential
4 attorney-client communications. And that has not
5 happened and so they're just sitting there until the
6 parties come to an agreement.

7 So we-- our goal-- and Ms. Treadway, who's
8 much more experienced in Taint Teams, advised me how to
9 handle this procedure in proposing it at the meet and
10 confer. She suggested, and I did so, let the defense
11 attorneys weigh in first and provide the search terms,
12 and then we will execute those search terms on the
13 computer images. And whatever information they draw up
14 based on those search terms will be provided over to the
15 defense attorneys first. And then they will identify
16 what they believe is privileged and what they do not
17 believe is privileged.

18 What they identify as privileged would then
19 go to the Taint Team. And then if the Taint Team agreed
20 it was privileged, we're done, the prosecution team
21 never gets to see it. If the Taint Team disagrees, then
22 Ms. Treadway would bring that matter to the Court.

23 THE COURT: And other than Ms. Treadway, are
24 there any other employees of the U.S. Attorney's Office
25 that are on the Taint Team?

1 MS. TOMASIC: No, Your Honor.

2 THE COURT: Who are the other people on the
3 Taint Team?

4 MS. TOMASIC: IRS agents.

5 THE COURT: That are not involved in this
6 investigation?

7 MS. TOMASIC: Yes, Your Honor. And I would
8 elaborate, too, that IRS agents not involved in the
9 investigation were at each search location which-- on
10 April 8th, 2016, which was the day of the takedown,
11 including CCA and various residences in Missouri. And
12 they were onsite Taint Team agents who, if an agent
13 encountered something he believed to be attorney-client
14 or she believed to be attorney-client, the Taint agent
15 would come in and looked at it substantively and decided
16 if it was privileged. And if it was, the agent who's
17 conducting the search wouldn't look at it further.

18 Specific to CCA, our concern was that, based
19 on jail calls, we-- the agents believed that inmates
20 were-- had instructed an individual on the outside at
21 least in one instance to go to Kinko's and print up fake
22 legal letterheads and then to spray that paper with
23 synthetic cannabis chemicals and then to send it in as
24 legal mail. And then the paper would be cut up and
25 smoked like a synthetic marijuana joint.

1 And so at least in CCA, the Taint Team's
2 purpose was to look at the legal mail and see if it
3 perhaps was fake legal mail that was really a drug or
4 sprayed with chemicals that were K2 cigarettes.

5 THE COURT: And so the Taint Team does have
6 that in their possession at this point, or no?

7 MS. TOMASIC: Nothing was seized. Nothing
8 privileged was seized at CCA. The Taint Team looked at
9 everything, didn't locate anything, and it was not
10 seized.

11 THE COURT: All right. The government's
12 response indicates or asserts that inmates knew that
13 their conversations were being audio-recorded. Is there
14 support in the record that each inmate actually received
15 and reviewed the inmate handbook which provided notice
16 of recording?

17 MS. TOMASIC: The government has a witness
18 prepared to testify, Laurie Harrison I believe is her
19 name, and she is an intake officer and she would testify
20 that the inmate handbook is provided to each inmate at
21 intake. The government also has-- and I don't know if
22 the Court has a copy of the government's proposed
23 exhibits, but there is a-- a form which the government -
24 it's Government's Exhibit No. 1 - would move to admit at
25 this time.

1 MS. BRANNON: No objection. I think we've
2 already admitted it as a defense exhibit.

3 THE COURT: It was attached to your brief as
4 well?

5 MS. TOMASIC: Yes, Your Honor.

6 THE COURT: Yeah, but you can certainly--
7 all right. Exhibit 1 is admitted.

8 Are you intending to call her as a witness
9 or proffer her, or what are you doing?

10 MS. TOMASIC: We could call her as a-- we
11 would be intending to call her as a witness, Your Honor,
12 yes.

13 THE COURT: Okay. All right. So they
14 received this at the time of the intake.

15 MS. TOMASIC: Yes.

16 THE COURT: And does this-- is there
17 something else they receive that describes for them the
18 procedure to make sure their outgoing or incoming
19 attorney calls are not recorded?

20 MS. TOMASIC: That is in the inmate
21 handbook, which is Government's Exhibit No. 2. And,
22 Your Honor, the government moves to admit Exhibit No. 2
23 at this time.

24 THE COURT: All right. Why don't we just
25 walk through all your exhibits and I'll admit them at

1 this point. So Exhibit 2 is the CCA inmate handbook,
2 that will be admitted.

3 MS. TOMASIC: And then 3 is a photograph of
4 a sign at CCA above a Securus phone. And 4 and 5 are
5 photographs of signs on a CCA phone. And 6 is a
6 photograph of a Securus sign. And the government moves
7 to admit Exhibits 3 through 6 at this time.

8 MS. BRANNON: Judge, we don't have any
9 objection to those as long as they're admitted to the
10 Court in a way that the properties of the photographs
11 are available. The properties will show that all of
12 these photographs were taken August 18th, which was
13 after the Court's order to change the recording
14 practices at CCA. And so we believe the signage changed
15 after that. So as long as the Court has that available,
16 that the photographs post-dated the Court's order.

17 THE COURT: Is there any dispute that these
18 photographs were taken on August 18th or after the Court
19 had issued an order?

20 MS. TOMASIC: No, Your Honor.

21 THE COURT: Any dispute that CCA changed its
22 signage after the Court's order?

23 MS. TOMASIC: With some clarification. My
24 understanding is, and we would have to have the-- the
25 witness testify to this, is that certain signs were

1 pulled down and replacement signs were put up that
2 where-- the wording was perhaps slightly different in
3 some pods, but not the signage that is on the phone.

4 THE COURT: All right. I'll admit
5 Exhibits 3 through 6 with that understanding, that it
6 goes to the weight but not the admissibility, and hear
7 further from the witness as to when these signs were
8 placed and how they differed, if at all, from what was
9 there before.

10 All right. So Exhibit 7.

11 MS. TOMASIC: Is the screenshot of a Securus
12 computer showing the blocked calling restriction. And
13 that's the manner in which a phone call can be blocked
14 through Securus.

15 THE COURT: All right. Exhibit 7 admitted.

16 MS. TOMASIC: And then Exhibit No. 8 are
17 copies of e-mails from SAUSA Erin Tomasic to counsel
18 regarding CCA video-recordings.

19 THE COURT: All right.

20 MS. BRANNON: We have not seen those, Your
21 Honor.

22 MS. TOMASIC: Okay. Your Honor, may I have
23 a moment?

24 THE COURT: Yes.

25 MS. TOMASIC: Your Honor, those aren't

1 relevant to this issue, so the government does not move
2 to admit those at this time.

3 THE COURT: Exhibit 8? All right.

4 MS. TOMASIC: And then there is an
5 additional exhibit, Your Honor, that the government
6 would move to admit under seal, and that is the signed
7 forms that are the exact form in Government's Exhibit
8 No. 1 for all 40 inmates whose phone calls were
9 obtained.

10 THE COURT: Is that Exhibit 11?

11 MS. TOMASIC: Yes, Your Honor.

12 THE COURT: All right. I'll admit those
13 under seal--

14 MS. BRANNON: Judge, could we have copies of
15 those?

16 THE COURT: -- Exhibit 11. But I think the
17 parties should have copies of them.

18 MS. TOMASIC: Your Honor, may we approach on
19 that issue?

20 THE COURT: Okay.

21 (Proceedings had at the bench, outside the
22 hearing of open court).

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(Proceedings continued in open court).

THE COURT: All right. Let me continue with the questions. You're going to have these witnesses testify about how CCA records, the warnings, the signage, the inmate handbook, so that I won't ask-- I had a whole series of questions about that. And

1 obviously I have a number of affidavits from practicing
2 lawyers that address a number of these questions in
3 their view, so I won't ask those. I have questions
4 about the CCA recording system itself and how those are
5 secured or saved. I'll ask the witness that.

6 But I'll ask you this: Were there any
7 incoming phone calls from attorneys to inmates at CCA
8 that were recorded?

9 MS. TOMASIC: That is not a possibility on
10 the recorded line. So there's two methods by which an
11 attorney can contact their client. First, an inmate can
12 place an outgoing call in his pod. And that's the
13 phones with the signs that say that, "This phone is
14 subject to recording and monitoring." And those are the
15 phones where the preamble plays before the call is
16 initiated to both parties, "This phone call is subject
17 to recording and monitoring." An inmate can place an
18 outgoing call only using a phone card to his or her
19 attorney on that line, and that is the phone line that
20 the attorney has the capability of blocking by sending a
21 fax to CCA recommending that his or her phone number be
22 blocked as an attorney.

23 There is a second method, and that is the
24 method that's set forth in Government's Exhibit No. 1--
25 excuse me, it's not set forth in Government's Exhibit

1 No. 1. The second method is that an inmate can tell his
2 or her counselor that he wants to place a call to his
3 attorney or the attorney can contact CCA, and usually
4 they'll know their inmate's counselor and contact them
5 directly or there's a receptionist that they can contact
6 by phone or e-mail. And when that is done, the inmate
7 is called out to the counselor's office. And that is a
8 line that is not recorded and the inmate can talk to his
9 or her attorney in the counselor's office on an
10 unrecorded line.

11 THE COURT: So how is it that there are
12 attorney-client calls that are in the recordings then?

13 MS. TOMASIC: Only if an attorney didn't
14 block-- send a fax to CCA and block his or her number.
15 If there are phone calls in the counselor's office,
16 those would never be provided to the government. In
17 fact, I didn't even know that that was a possibility
18 until this litigation arose. The only phone calls the
19 government gets are the phone calls initiated by an
20 inmate in his pod on the Securus phones with the
21 inmate's phone card. Otherwise, the-- those phone calls
22 in the counselor's office are not part of the litigation
23 here and I can't contemplate a circumstance under which
24 the government would even seek to obtain those calls.

25 THE COURT: All right. So outgoing calls

1 from CCA out are either not recorded because they're
2 placed in the counselor's office, or they're placed in a
3 pod, they can be recorded unless the number has been
4 blocked?

5 MS. TOMASIC: That's correct, Your Honor.

6 THE COURT: Incoming calls can be recorded
7 unless the number has been blocked?

8 MS. TOMASIC: No, Your Honor. There are no
9 incoming calls to the pod. And the only incoming calls
10 would be to a counselor's office, and those lines are
11 not subject to recording.

12 THE COURT: Okay. So the only possibility
13 of recordings are outgoing calls from a pod that-- with
14 non-blocked attorney numbers?

15 MS. TOMASIC: That's correct, Your Honor.

16 THE COURT: Okay. Your response indicates
17 that a government agent inadvertently listened to a
18 phone call, an attorney-client call, in January, 2016.
19 I may have asked you this already, but did you notify
20 counsel-- and that you did notify counsel for that
21 defendant of the recording. At that time did you notify
22 any other defense counsel that their calls with clients
23 at CCA were being recorded or perhaps were being
24 recorded?

25 MS. TOMASIC: No, Your Honor. Because

1 this-- based on my understanding, this was an
2 exceptional circumstance where an attorney did not block
3 his or her number.

4 THE COURT: Are you aware of any other
5 instance in which an attorney or agent listed-- listened
6 to recorded attorney-client phone calls?

7 MS. TOMASIC: Since the first hearing, I
8 have questioned the agents and I am aware of additional
9 circumstances where, for example, Marshal Cahill
10 encountered one attorney call. And he estimates that he
11 listened to between 500 and 1,000 calls as part of this
12 investigation. He encountered one call, it was an
13 outgoing call from a female inmate. And when the phone
14 picked up, it said, "law office," that's it. It was a
15 receptionist he assumes, and then he hung up-- he
16 discontinued listening to that call.

17 THE COURT: Okay.

18 MS. TOMASIC: There may be additional
19 instances where other agents encountered calls. Again,
20 I would have only learned of those after this first
21 hearing. For example, I believe Deputy U.S. Marshal Zac
22 Howard encountered some attorney calls. But again, he
23 said the phone was answered "law office," and he
24 discontinued listening. So there was no substance that
25 was encountered.

1 THE COURT: Okay. In the past, has the U.S.
2 Attorney's Office used attorney-client recordings in any
3 other cases, to your knowledge?

4 MS. TOMASIC: Used them?

5 THE COURT: In any way.

6 MS. TOMASIC: I can think of-- well, first
7 of all, I'm not in a position to know for everyone else,
8 so I don't want to speak to that. I can think of one
9 instance in which I, along with another AUSA, subpoenaed
10 calls to a particular attorney's-- not subpoenaed,
11 either requested or subpoenaed calls to an attorney's
12 cell phone number. Those were provided to a Taint Team,
13 because we had reason to believe, based on the
14 attorney's representations, that he was communicating
15 with other inmates who were represented by counsel
16 without contacting their attorney first.

17 And the Taint Team went through those calls
18 to find the calls with the other inmates. And that
19 information was provided to a Taint attorney not
20 associated with the investigation, and that that
21 investigation is-- not that that investigation-- that
22 matter is pending at this time in another court.

23 THE COURT: All right.

24 MS. TOMASIC: And the purpose of those phone
25 calls with the other inmates was to procure them as

1 witnesses and wasn't necessarily beneficial to their
2 interest. And the attorney knew that those other
3 inmates were represented by counsel, and he was
4 intentionally not going through their attorneys.

5 THE COURT: All right. Let's see, I think
6 we've talked-- I asked you about the computers in the
7 law library, a Taint Team involved, but none of that has
8 been viewed by the Taint Team yet. It's been imaged,
9 but nobody has gone through any of that yet--

10 MS. TOMASIC: That's correct.

11 THE COURT: -- because you're working on
12 search terms.

13 All right. August 25, you provided an
14 ex-parte letter to the Court that summarized the storage
15 of certain discovery in the case. It spoke to the
16 servers that I asked you about a little earlier.
17 Defense counsel have not been given a copy of this
18 letter, and I wanted to ask you, was there any reason
19 why it should remain ex-parte? I thought it would be
20 helpful for them to know what steps you've taken.

21 MS. TOMASIC: Your Honor, the decision to
22 write a letter under those circumstances was made in
23 concert with supervisors, so I would ask if they have
24 any reason.

25 MS. BARNETT: No, I don't believe we have

1 any reason, Your Honor, not to give it to defense
2 counsel.

3 THE COURT: Okay. We're going to-- and I'm
4 going to need to schedule with you all shortly another
5 discovery conference. I'm going to schedule probably an
6 ex-parte one with the defense because we need to sit
7 down with the case budgeting attorney and Mr. Naseem and
8 talk about some of those things, but we also need to
9 have one with everyone. So I just thought that would be
10 helpful for them to know what you've done in terms of
11 compliance with the impoundment order.

12 One thing that was raised in the defendant's
13 submissions that I want to ask you about is, they were
14 concerned about your office doing a cyclical replacement
15 of equipment and concern probably about spoliation of
16 evidence or files or deletion or modification or
17 something in the conversion of files. What can you tell
18 me about that?

19 MS. TOMASIC: That's not going to be me,
20 Your Honor.

21 THE COURT: Okay.

22 MR. SLINKARD: Your Honor, I asked that
23 question, in light of the defense's filing, of our
24 computer information manager, for want of a recollection
25 of his specific title. This was a cyclical refresh of

1 new PC units in all of the three branch offices of the
2 U.S. Attorney's Office. And he informs me that the hard
3 drives from the old laptops and desktops have been
4 removed from the machines, are labeled and are in
5 storage in each district office.

6 Before sending them off for ultimate data--
7 to the data destruction center in Columbia, South
8 Carolina, as part of the decommissioning process, he
9 intended to hold on to them for at least another month
10 to accommodate user requests to restore any files that
11 had not properly been backed up during the conversion to
12 the new machines.

13 THE COURT: I think those need to be held on
14 to until further order of the Court so the--

15 MR. SLINKARD: Well, that's what I was going
16 to ask your opinion on that.

17 THE COURT: Okay.

18 MR. SLINKARD: "All old laptop hard drives
19 are protected with Check Point Full Drive Encryption, so
20 any drive encryption with the Full Drive Encryption can
21 only be read when re-connected with its original laptop
22 chassis. And those original laptop chassis, after the
23 hard drives are removed, are due to be turned in."

24 So I'm assuming based on-- on your order,
25 that you would want the laptops that are necessary to--

1 to access those individual hard drives to be-- an
2 ability to access those laptop hard drives be also
3 retained until further order of the Court?

4 THE COURT: Yeah. And I don't-- I don't
5 know if this really will be something that someone needs
6 to look at or not, but in-- it would be much safer to
7 have everything preserved until further order.

8 MR. SLINKARD: That is the information that
9 he provided today immediately prior to the hearing.

10 THE COURT: Okay.

11 MR. SLINKARD: So we will communicate with
12 him that we need to retain the hard drives from the
13 Kansas City office, unless the Court orders more
14 broadly, retain the hard drives from the Kansas City
15 office, as well as the ability to access the laptop hard
16 drives from the Kansas City office, if that's
17 acceptable.

18 THE COURT: Yeah, that's fine. Just the
19 Kansas City division will be fine. And that's something
20 I'll ask whoever is appointed to look into fairly
21 quickly so we can determine whether you really need to
22 hold on to those things any longer or not.

23 MR. SLINKARD: Thank you, Your Honor.

24 THE COURT: Okay. I have the government's
25 exhibit list. I don't know that I have a copy of the

1 exhibits. Do we have the originals or-- that have been
2 admitted? I also have an exhibit list from the
3 defendants, it's cumulative I think from the other
4 things that were admitted before, but now there's some
5 additional proposed defense exhibits.

6 (The Court and courtroom deputy confer).

7 THE COURT: Mr. Jenab, we should've made a
8 record of this, couldn't be here. He's on vacation. He
9 had asked to participate by phone, we forgot to call
10 him. And we've since talked to him and he's okay, he'll
11 just get a transcript of today's hearing.

12 Okay. So I just want to make sure those
13 exhibits are in the record from the government.
14 Likewise, I think we need to-- I need to admit-- it
15 looks like it's Exhibits 440 through 463 on behalf of
16 the defense for today's hearing.

17 MS. BRANNON: Yes, Your Honor.

18 THE COURT: Okay.

19 MS. TOMASIC: And, Your Honor, the
20 government also moves to admit Exhibit No. 9, which is
21 the e-mail from Kenneth Lajiness, who's an employee of
22 CCA, to Pauletta Boyd, providing her with the camera
23 roster on June 10th, 2016.

24 MS. BRANNON: Could we see it, please? We
25 don't have any objection to... No. 8? Or was it 9?

1 THE COURT: It's Exhibit 9; is that correct?
2 All right. Exhibit 9 will be admitted. And there's
3 another Exhibit 10, did you intend to admit that as
4 well?

5 MS. TOMASIC: Exhibit No. 10, Your Honor,
6 yes, is the e-mail from SAUSA Tomasic, me, to an
7 attorney explaining that his phone calls were
8 inadvertently listened to and then his response. And
9 that's Government's Exhibit No. 10, the government moves
10 to admit at this time.

11 THE COURT: All right. Exhibit 10 will be
12 admitted as well. And--

13 MS. TOMASIC: And then--

14 THE COURT: Oh, I'm sorry, go ahead.

15 MS. TOMASIC: I'm sorry, Your Honor.
16 Finally, Government's Exhibit No. 8 is a series of
17 e-mails sent by SAUSA Tomasic to defense counsel of
18 record in this case and also in related cases regarding
19 the attempted distribution of CCA surveillance footage
20 beginning on April 27th. And that's Government's
21 Exhibit 8.

22 MS. BRANNON: Could we have just a moment,
23 Your Honor?

24 THE COURT: Yes.

25 MS. TOMASIC: And, Your Honor, may I

1 approach? Does the Court already have a copy of all of
2 the exhibits?

3 THE COURT: I don't, no. All right. I
4 think that completes my questions at this time.

5 MS. BRANNON: We don't have any objection to
6 No. 8.

7 THE COURT: I'm sorry?

8 MS. BRANNON: We don't have any objection to
9 No. 8.

10 THE COURT: Oh, all right. Exhibit 8
11 admitted as well.

12 MS. BRANNON: Judge--

13 THE COURT: Ms. Brannon, let's run through
14 your exhibits and get those admitted for the record as
15 well.

16 MS. BRANNON: Your Honor, we have noted the
17 proposed defense exhibits. I checked with Ms. Barnett,
18 they don't have any objection to any of these being
19 admitted.

20 THE COURT: All right. So Exhibit 450,
21 transcript of a hearing, United States versus Huff, on
22 May 16, 2016 admitted. Exhibit 451, affidavit of Gary
23 Hart, admitted. Exhibit 452 is an August 22, 2016
24 e-mail from Ms. Tomasic to me, and that's admitted as
25 Exhibit 452. Exhibit 453, an e-mail from Ms. Brannon to

1 Ms. Barnett dated August 3, admitted. Exhibit 454, a
2 transcript of a hearing in United States versus Wright
3 on August 5, that's admitted.

4 Exhibit 455 is an e-mail from Assistant U.S.
5 Attorney Oakley regarding some phone calls. That's
6 dated August 18th. That's admitted. Exhibit 456 is
7 another transcript of a hearing in United States versus
8 Huff. This one on August 22. That's admitted.
9 Exhibit 457 is a transcript in U.S. versus Benimon dated
10 August 22. That's admitted. Exhibit 458 is an August 5
11 e-mail from Deputy U.S. Marshal Craig Beam, that's
12 admitted.

13 Exhibit 459 are a number of affidavits from
14 attorneys on the CJA panel; Christopher Joseph, Kathleen
15 Ambrosio, Roberto Calbi, Cynthia Dodge, John Jenab, Deb
16 Vermillion, Michael Jackson, Jackie Rokusek, Tom Haney,
17 Robin Fowler. And is it Thomas Telthorst.

18 MS. BRANNON: No, Your Honor. And I'm
19 looking. We have them listed in a footnote within the--
20 it is Tom Johnson.

21 THE COURT: Thomas Johnson.

22 MS. BRANNON: And there's also Melanie
23 Morgan, those just got cut off on the list.

24 THE COURT: All right. So Exhibit 459
25 admitted. 460 is an e-mail from CCA local counsel

1 regarding CCA inmate intake form. It's dated August 24.
2 That's admitted. Exhibit 461 are docket sheet excerpts
3 from U.S. versus Dertinger. That's admitted. 462 is a
4 transcript in a hearing in this case on August 9th. And
5 finally-- and it's admitted. And finally, Exhibit 463
6 is a transcript of the August 16th hearing in this case,
7 it's admitted. Is that everything?

8 MS. BRANNON: It is, Your Honor.

9 THE COURT: Okay.

10 MS. BRANNON: There is one other matter we
11 need to take up as long as we're dealing with documents.
12 In Mr. Hart's affidavit, he describes obtaining phone
13 calls from Securus that included phone calls between my
14 office and a former client, but it also includes phone
15 calls between my office, which we believe to have been
16 blocked, and other clients, as well as Tricia Bath and
17 some clients. What we've done is we've sealed these and
18 we would tender these to the Court because it does
19 include privileged information.

20 THE COURT: All right. This is Exhibit 464.
21 It's sealed for the Court's eyes. And it's recordings?

22 MS. BRANNON: It's what Mr. Hart subpoenaed
23 from Securus that is described in his affidavit. I will
24 tell the Court the only phone call we listened to was
25 one between Mr. Burdick in our office and a client of

1 his that are unrelated to this case. And so we would
2 submit-- this is the only copy that we have. Mr. Hart
3 has copies as well.

4 THE COURT: All right. You can give that to
5 Ms. Wiest. That's Exhibit 464, and that's admitted as
6 well under seal.

7 And again, just to be clear, on Exhibit No.
8 11, it is admitted under seal except for those
9 acknowledgment forms for the named defendants in this
10 case.

11 MS. TOMASIC: And, Your Honor, there are a
12 few more government exhibits.

13 THE COURT: Okay.

14 MS. BRANNON: Judge, we'd ask for a recess
15 so that we can review these. They don't have copies for
16 us and we haven't seen them.

17 THE COURT: All right. Let's be in recess
18 for 15 minutes.

19 (Recess).

20 THE COURT: All right. You can be seated.
21 So there was an additional exhibit. Have you had a look
22 at it, Ms. Brannon?

23 MS. BRANNON: Yes, Your Honor, we have. We
24 understand that the government has the original-- or has
25 copies of recordings of these phone calls. We would

1 like to have copies of that. I understand they're
2 making copies for us, and we'd like to listen to them
3 before they're submitted to the Court.

4 If the recordings are accurate and reflect
5 what's on these transcripts, we think the Court could
6 just accept the recordings themselves. We have a number
7 of issues with the transcripts themselves because they
8 have extraneous information on them. They were
9 apparently prepared yesterday. But to the extent that
10 it has information beyond what is the actual transcript,
11 we would object.

12 THE COURT: Okay. I'm not understanding.
13 I'm trying to look back to see where we left-- I'm not
14 sure I even understand what this exhibit is.

15 MS. BRANNON: Sure, I'll back up. I believe
16 Government Exhibits 13, 15, 17, and 19 are documents
17 that were prepared by the U.S. Attorney's Office, I
18 believe by Agent Herron yesterday. They purport to be
19 transcripts of a call between Ashley Huff and other
20 people using someone else's PIN. We just received
21 these, we have not heard the actual recordings. We'd
22 like to hear the recordings before they're submitted to
23 the Court.

24 THE COURT: Okay. I see. So this-- all
25 right. So just so I'm clear, when we broke, I thought

1 there was an additional exhibit the government-- you
2 hadn't seen it. I didn't know what it was. That's why
3 I'm confused.

4 MS. BRANNON: I'm sorry, Judge.

5 THE COURT: So, Ms. Tomasic, these are
6 Exhibits 13, 15, 17, and 19, that's what you've marked
7 them as?

8 MS. TOMASIC: That's what the transcripts
9 are, and then there's calls associated with them, which
10 would be 14, 16, 18, and 20. And we had provided only
11 the portion of the call on the disk that goes with this
12 particular transcript, but Ms. Brannon would like to
13 review the entire call. So we're in the process of
14 providing that to her. I don't know that, given our
15 time constraints, we could address that at this time.

16 I would just proffer at this point and allow
17 the Court to proceed accordingly, however you choose
18 after I proffer, that the government believes that these
19 phone calls are relevant because in defendant's-- or the
20 FPD's, excuse me, reply, which is Document 130 at
21 Page 4, they include in their factual basis a transcript
22 and-- excerpts from that from something that happened on
23 May 16, 2016, in United States v. Ashley Huff, a case
24 pending before Judge Murguia. And they note that
25 counsel for the government reported that Ms. Huff has

1 met with her attorney regarding his ineffective
2 assistance of counsel--

3 THE COURT: Okay. I'm well aware of this
4 issue and I understand the dispute.

5 MS. TOMASIC: Okay.

6 THE COURT: So I think it is probably
7 relevant. But I'll admit these subject to your review.
8 And if you want to file an objection, I won't look at
9 them obviously until you have an opportunity to hear the
10 recording, compare them in the transcripts, and raise
11 any objection you want to do.

12 MS. BRANNON: I would tell the Court if they
13 are what they're purported to be, we don't have any
14 objection.

15 THE COURT: Okay. So Exhibits 13 through
16 20, tapes and transcripts, are admitted, subject to
17 objection by the defense once they have an opportunity
18 to review.

19 MS. BRANNON: Judge, I-- if I may, we don't
20 have objection to the recordings themselves. We do have
21 an objection to, for example, Exhibit 19 because it has
22 basically narrative on there that is not transcript,
23 adding information that we think is not part of the
24 phone calls themselves.

25 THE COURT: All right. The real evidence,

1 of course, are the recordings of the calls. The
2 transcript is just an aid. I will disregard. I'll
3 instruct the expert or master to disregard any narrative
4 and to only use the transcripts as an aid, if at all.
5 The real evidence being the calls.

6 MS. BRANNON: So if a redacted version of
7 this could be provided, I think we'd be satisfied.

8 THE COURT: All right. Is that acceptable?

9 MS. TOMASIC: Yes, Your Honor. We will work
10 it out with Ms. Brannon during the next break.

11 THE COURT: Okay. If you all can maybe
12 accomplish this within the next couple of weeks, that
13 would be helpful.

14 Okay. All right. So other than your
15 witnesses who you're going to call, no other evidence
16 from the government. Correct?

17 MS. TOMASIC: That is correct, Your Honor.

18 THE COURT: Okay. And other than these
19 exhibits, any other evidence from you?

20 MS. BRANNON: Not unless something comes up
21 with these witnesses, Your Honor.

22 THE COURT: Okay. Understood. All right.
23 Call your first witness.

24 MR. OAKLEY: Your Honor, the United States--

25 THE COURT: And how long do you anticipate

1 with these witnesses?

2 MR. OAKLEY: I'm very bad at these guesses,
3 Your Honor, but I would say 20 minutes apiece. And
4 there are two witnesses.

5 THE COURT: Okay. Go ahead.

6 MR. OAKLEY: United States calls Wayne
7 Bigelow.

8 SERGEANT WAYNE LEE BIGELOW,
9 called as a witness on behalf of the Government, having
10 first been duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MR. OAKLEY:

13 Q. Sir, would you please tell the Court your name?

14 A. My name is Wayne Lee Bigelow.

15 Q. And could you please spell your name for the
16 court reporter?

17 A. It's Wayne, W-A-Y-N-E. Middle initial L. Last
18 name, B-I-G-E-L-O-W.

19 Q. And how are you currently employed?

20 A. I'm the Security Threat Group Coordinator for
21 Leavenworth Detention Center, Correction Corporation of
22 America.

23 Q. Now, how long have you worked for-- now, that
24 company, is it commonly referred to as CCA?

25 A. Yes, sir.

1 Q. How long have you worked for CCA?

2 A. 14 years.

3 Q. How long-- you said that you're currently the
4 Security Threat Group Coordinator. How long have you
5 been in that position?

6 A. Nine months.

7 Q. And what are your duties as the Security Threat
8 Group Coordinator as it relates to CCA's phone recording
9 system?

10 A. I maintain contact with the-- it's a Securus
11 platform. Securus is a company. I maintain a
12 relationship with the individuals there. Any required
13 maintenance. If I have a request for phone recordings
14 or a list of phone calls made, things like that, why, I
15 handle those requests.

16 Q. Okay. Are you familiar with CCA's policies
17 regarding how an attorney can make a request that their
18 phone number be blocked from the Securus system?

19 A. I am.

20 Q. Now, are you the person that handles those
21 requests?

22 A. I have been, yes.

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

24 A. For nine months.

25 Q. Okay. You said that-- that CCA contracts with

1 Securus. Securus is the company that-- that has the
2 phone recording system; is that accurate?

3 A. That's correct.

4 Q. So when an attorney makes such a request to you,
5 how is that request made?

6 A. Generally they'll either send me a fax or I will
7 get a letter with their letterhead identifying the-- the
8 firm or the attorneys involved. They'll give me a list
9 of phone numbers. At that time I will go in and each--
10 each number is done individually. I will place them on
11 private-- there's a-- there's a place on the format that
12 shows a private attorney privilege on it. I also
13 identify that number. At the bottom of the-- of the
14 screen will show an area for the law firm, and I put
15 that information on as well. And then I return a cover
16 letter with the information stating that-- that the
17 numbers that they have sent and requested to be
18 restricted have been done.

19 MR. OAKLEY: Your Honor, may I approach?

20 THE COURT: Yes.

21 Q. (BY MS. BARNETT) Sergeant Bigelow, I've handed
22 you what's been marked as Government's Exhibit 7. Are
23 you familiar with that document?

24 A. Yes, sir.

25 Q. Is that a-- a copy of the computer screenshot for

1 the Securus system that you utilize?

2 A. It is.

3 MS. BARNETT: And, Your Honor, I believe
4 this has already been admitted. But if not, I'd offer
5 it as an exhibit.

6 THE COURT: I think that's Exhibit 7, it's
7 been admitted.

8 MR. OAKLEY: Thank you.

9 Q. (BY MR. OAKLEY) So, Sergeant Bigelow, I'm
10 showing you the photocopy of this screenshot. Could you
11 explain for the Court exactly what it is that we're
12 looking at?

13 A. This is the-- this is the actual screenshot that
14 I use. At the top it will say-- it says "dialed
15 number." The-- the box that has the 1 is obviously for
16 the beginning of the number. The second oblong box
17 there is for the 10-digit number with the three-digit
18 area code and the phone number itself.

19 And then I go down to where it says, "Private use
20 for attorney-client privilege," and check that box. And
21 then all the way down to where it says "Description,"
22 and that's where I type in the-- the law firm or the
23 individual attorney, whichever the case may be, and put
24 that in there. And then to actually complete the
25 process, there at the bottom it says-- it shows

1 "Create," and I-- I click that and it actually puts it
2 in the database. So it-- it disables that particular
3 phone number from being monitored or recorded.

4 Q. Okay. Now, when you entered that information, is
5 it specific to a particular inmate or is that attorney's
6 phone number that you enter then blocked as to every
7 inmate that is at CCA?

8 A. No one in the monitored system is able to call
9 that number. And we-- we are not able to-- it
10 completely disables us and prevents us from recording or
11 monitoring that number, it matters not who calls.

12 Q. Okay. When you say the recorded system, are you
13 referring to the phones that are located in the inmates'
14 pods--

15 A. That's correct.

16 Q. -- in the living facility--

17 A. That's correct, yes.

18 Q. -- at CCA?

19 A. Uh-huh.

20 Q. And so you don't have to do that-- an attorney
21 doesn't have to do that for every client?

22 A. No.

23 Q. Just once is effective?

24 A. That's correct.

25 Q. Now, do you know how long it's effective for?

1 A. Until it's removed.

2 Q. Do you know how to remove that-- that block?

3 A. I-- actually I've never done it at this point.

4 I've never had a request from anybody to remove a
5 restriction on a phone number. So I'm-- that's another
6 process. And I couldn't honestly tell you how to do it
7 because I haven't done it yet.

8 Q. Okay. And you've been in this position for-- for
9 nine months you said?

10 A. That's correct, yes, sir.

11 Q. Okay. And so when you talk about the process and
12 never having done it, you're referring to the last nine
13 months?

14 A. That's correct.

15 Q. Okay. Other than an attorney making a request in
16 writing to the Security Threat Group Coordinator, is
17 there any other way that an attorney or an inmate can
18 request an unrecorded phone call at CCA?

19 A. The-- the procedure we presently have in effect
20 at this point is the attorney will usually call and give
21 us a 24-hour notice requesting an unmonitored phone call
22 or a conference with an inmate. Our unit team generally
23 will conduct that process. Anybody can, but unit team
24 members usually take care of it, either the case manager
25 or counselor. The attorney will either send an e-mail

1 or make a phone call to the receptionist and schedule
2 that. A copy of that goes to that individual unit team,
3 depending on where the housing location of that
4 particular inmate is, and they will call-- return a
5 phone call back to the attorney confirming that we have
6 received it and making sure that we're-- we're on
7 agreement as to the schedule of the time.

8 I have several in-- in the past that have fallen
9 during count procedure and I've had to reschedule them a
10 few minutes earlier or a few minutes later. So we get
11 together on that. And then at the date and the time
12 that the actual phone conference is conducted, then we
13 bring the inmate into the office and use the telephone
14 there to make the call.

15 Q. And the telephone in the office is not a line
16 that is recorded by the Securus system?

17 A. That's correct.

18 Q. Now, do you know how inmates are informed of
19 these procedures?

20 A. The inmate handbook has the information printed
21 in it to-- to notify them as to the fact that the-- the
22 phones in the pods are all monitored and recorded.
23 They're capable to be monitored, they're not always
24 monitored, but they are recorded. We have signage in
25 the-- the housing units that state it. The signage is

1 in the vicinity of the-- of the telephone so that it's--
2 it's there so that they can-- and it's in English, as
3 well as Spanish, both.

4 Q. Okay. I'm going to hand you some photographs
5 that have been admitted. These are Government's
6 Exhibits 3, 4, 5, and 6. Are you familiar with those
7 photographs?

8 A. Yes, sir.

9 Q. Do those photographs fairly and accurately depict
10 the signage that is-- is present at CCA?

11 A. Yes, sir, they do.

12 Q. Now, that's-- that does not represent the
13 entire-- all of the phones at CCA; is that correct?

14 A. No, sir.

15 Q. But that's an example of-- of some of the signage
16 that is visible?

17 A. Yes, sir.

18 Q. Now, do you know if at some point during the last
19 month or so if some additional signs were put up at--
20 some new signs were put up at CCA?

21 A. Yeah, there were some-- some new ones added and
22 there was-- there was some of the older signs that had
23 been replaced.

24 Q. Okay. Do you--

25 A. And these-- this is an example of the-- one of

1 the older ones. I don't see one of the new ones here,
2 but this is one of the older signs right here.

3 Q. And for the record, you're referring to
4 Government's Exhibit 3?

5 A. Yes.

6 Q. Okay. And so that's-- that's one of the older
7 signs that was--

8 A. That's correct, uh-huh.

9 Q. -- not recently replaced?

10 A. That's correct, yes.

11 Q. Okay. Do some of the phones themselves as
12 depicted in the other photographs have signs on them
13 indicating that the-- the calls made from that
14 particular phone are recorded?

15 A. They do not, to my knowledge.

16 Q. Directing your attention to Government's
17 Exhibit 5. Would you-- does that appear to be one of
18 the Securus phones?

19 A. Yeah, that's the same-- correct, that's right, it
20 does say there.

21 Q. Okay. And for the record, you're showing me
22 Government's Exhibit 6?

23 A. Yes.

24 Q. Is Government's Exhibit 6 a close-up photograph
25 of a sign that appears on-- on a phone similar to the

1 one that's depicted in Government's Exhibit 5?

2 A. It is, yes, sir, uh-huh.

3 Q. Okay.

4 A. It gives dialing instructions and then, "Calls
5 are subject to monitoring and recording."

6 Q. Okay. Now, when an inmate makes a phone call
7 from one of the-- the phones that are subject to
8 recording, the inmate making the phone call, are they
9 advised in any way that the call is recorded during the
10 phone call?

11 A. There is a recorded message that they get upon
12 initiating the phone call. It will also-- it will tell
13 them that the-- the phone call may be monitored and will
14 be recorded. And it gives-- also it gives the
15 individual receiving the phone call the opportunity to
16 block the call if they don't want to accept it.

17 Q. Okay.

18 A. They can actually on their end press 6 and the--
19 their number is no longer allowed to be called.

20 Q. But my question was whether or not the inmate
21 making the call is advised, and you said yes.

22 A. It is on both ends.

23 Q. Okay. In addition to having the opportunity to--
24 to hit 6 to reject the call or to be blocked, is the
25 person that receives the phone call placed from the

1 Securus phones advised that the call may be recorded, if
2 it's a phone call that is being recorded?

3 A. Yes, sir.

4 Q. And how are they advised?

5 A. It's on-- it's on the recording. Both-- both
6 parties involved-- pardon me. Both parties involved in
7 the conversation are-- hear the same recording.

8 Q. Okay. Now, you said that the information that
9 you enter into the computer system is Securus'
10 information; is that correct?

11 A. Yes, sir.

12 Q. Now, does CCA handle the blocking or is that a
13 Securus issue? Well, you physically enter it to block
14 it. Correct?

15 A. I physically do it, but it goes into their
16 database. I-- I know in the past, prior to my assuming
17 this position, that we could just contact the-- the
18 people at Securus and they would go ahead and block the
19 numbers. So that's-- they can do it on their end as
20 well.

21 Q. Okay. So either the Security Threat Group
22 Coordinator, your position--

23 A. Right.

24 Q. -- can do it or someone else can contact--

25 A. Correct.

1 Q. -- Securus directly?

2 A. Correct.

3 Q. Do you know--

4 THE COURT: Let me get clarity on that. I
5 don't understand. So you said in the past Securus has
6 sometimes entered the data themselves. How does that
7 happen and how long ago?

8 THE WITNESS: When I say the past, I'm
9 referring to my-- my position. I was not-- when I
10 readily took this position, I was not completely
11 familiar with the system at that time. So if I had--
12 and I had a couple of requests at that time that-- and I
13 didn't know exactly how to go about the procedure, the
14 actual procedure of physically doing it, so I contacted
15 the people at Securus and they-- they blocked it on
16 their end as opposed to me being able to do it on our
17 end.

18 THE COURT: So that was early in your
19 nine-month tenure?

20 THE WITNESS: That's correct.

21 THE COURT: Because you didn't understand
22 how to do it, you contacted them. You're not testifying
23 that an attorney or somebody else has--

24 THE WITNESS: No.

25 THE COURT: -- from time to time contacted

1 them?

2 THE WITNESS: No.

3 THE COURT: All right. I understand.

4 Q. (BY MR. OAKLEY) Now, the recording that both the
5 sending-- the person making the phone call and the
6 person receiving the phone call, the recording that they
7 hear, does it say that the phone call is subject to
8 recording or does it-- does it say it could be subject
9 to recording?

10 A. It goes into a-- as the way I understand the
11 process, it goes into a database. And for me to
12 reproduce it, I have to put the requested information
13 that-- the particular dates. And I can-- I can go
14 specific numbers or whatever, but I have to put it into
15 a database and make a request of Securus to get that
16 information so that I can reproduce it if I have to.

17 Q. Okay. But my question relates to the actual
18 recording that is heard by the inmate and whoever the
19 inmate is calling.

20 Does the recorded message, is it a general
21 statement of it could be recorded or does it
22 affirmatively state that this call is being recorded?

23 A. It will state that this-- that this is-- it is
24 subject to recording or monitoring.

25 Q. Okay. Do you know if when an inmate makes a call

1 to a blocked number, whether or not either the inmate or
2 the person receiving that phone call gets that
3 recording?

4 A. I do not.

5 Q. Have you ever listened to a phone call to a
6 blocked number?

7 A. I can't. I don't have the ability.

8 Q. Okay. And so, therefore, you wouldn't know in
9 that circumstance whether or not that message is played?

10 A. The only-- the only indication that I have is if
11 I had-- I pulled up a list of-- of completed calls from
12 an inmate to somebody outside the facility. It will
13 display on the right side-- or the left side of the
14 page, it will have little speaker icons. If those icons
15 are not there, if they're not displayed, then I can tell
16 by looking at that particular number that it's-- it's
17 been blocked.

18 Q. And you have no ability to listen to that?

19 A. And I-- I have no ability to listen to them or
20 record them.

21 MR. OAKLEY: Your Honor, may I have one
22 moment? No further questions, Your Honor.

23 CROSS EXAMINATION

24 BY MS. BRANNON:

25 Q. Good afternoon. I want to talk about terminology

1 to begin with. You've used the term "private" and the
2 term "blocked." What's the difference between those two
3 terms?

4 A. I honestly don't know. I assume they mean the
5 same thing. In the-- on the sheet that we've got here
6 as evidence here, I used the-- the "private" because it
7 says, "Use for attorney-client privilege." I don't know
8 that there's any real difference between something-- a
9 phone call being blocked or being privatized, to be
10 honest with you.

11 Q. So when an attorney would contact you and say, "I
12 don't want my phone calls to be recorded," you would be
13 the one to mark "private"?

14 A. That's correct.

15 Q. And if the term "blocked" is being used here
16 today, do you mean that it was private as opposed to
17 blocked?

18 A. Yes, ma'am.

19 Q. Because you don't know what blocked means?

20 A. That's correct.

21 Q. Okay. When you-- well, let me ask about this
22 first. You described a situation where an attorney
23 could call in and ask for a confidential phone call with
24 a client; is that right?

25 A. Yes, ma'am, uh-huh.

1 Q. And can the client also ask for a confidential
2 phone call?

3 A. No.

4 Q. Okay. So the only means that an-- that an inmate
5 has to initiate a phone call is by calling from the day
6 room or the pod?

7 A. That's correct.

8 Q. So if an inmate said, "I want to make sure that I
9 have a confidential phone call with my attorney," that
10 has to be initiated by the attorney?

11 A. I would say that if there was a special
12 circumstance or something, that we-- we'd give that some
13 consideration as far as allowing that to happen.

14 Q. That would be an exception, though?

15 A. We-- we could make an exception in a situation
16 like that, depending on what the circumstance is,
17 absolutely.

18 Q. Right. But your policy and practice is not to,
19 for example, have in the inmate handbook that they could
20 ask for this and initiate it on their own?

21 A. That's correct.

22 Q. When an attorney does initiate this confidential
23 phone call that you described in the counselor's office,
24 who else is present?

25 A. Usually a-- a member of the unit team.

1 Q. All right. So on the inmate's end of the phone
2 call, there is someone standing there listening to it.
3 Correct?

4 A. They're capable of it, yes.

5 Q. Well, you don't--

6 A. We do it for security reasons. We don't leave
7 the inmate unattended in the-- in an office situation.

8 Q. Right. So any time that is initiated by an
9 attorney, there is a member of CCA listening to that end
10 of the phone call?

11 A. Yes, ma'am.

12 Q. All right. You talked about what your
13 responsibility is as opposed to Securus. When an
14 attorney-- if an attorney were to contact you and say,
15 "I don't want my phone calls recorded," you check the
16 "private" box, it is your responsibility and CCA's
17 responsibility to make sure they're not recorded. Do I
18 understand that right?

19 A. Yes, ma'am.

20 Q. All right. Have you ever had the U.S. Attorney's
21 Office or any law enforcement agency contact you and ask
22 you to record phone calls that have been marked
23 "private"?

24 A. No.

25 Q. Would they-- would you be the person that they

1 went to?

2 A. Yes.

3 Q. If they did that, would there be some kind of
4 documentation that that had been done?

5 A. I don't have the ability to do that on my end. I
6 don't know whether it would be something that would-- we
7 could circumvent going through Securus or not, but I--
8 personally I don't-- we don't have the ability to do it.

9 Q. So you don't have-- I'm sorry.

10 A. Once they're put in there-- and like I say, I've
11 never unblocked one--

12 Q. Right.

13 A. -- I'm-- I'd be-- I'm sure I'd be remiss to say
14 that's not possible, because I'm sure it is. But I
15 would not have the slightest idea on how to do that,
16 so...

17 Q. Your understanding of the system is if the U.S.
18 Attorney's Office or law enforcement agency wanted to do
19 that, they would need to go through Securus to do this?

20 A. Correct.

21 Q. All right. And if they did that, you wouldn't
22 necessarily know about it?

23 A. No.

24 Q. All right. Do you know how long recordings of
25 phone calls are kept?

1 A. I don't.

2 Q. All right. Do you--

3 A. They are kept for a considerable amount of time
4 I'm sure.

5 Q. Is any part of your job related to maintaining
6 the phone calls or how long they're kept or anything
7 like that?

8 A. No, ma'am.

9 Q. As I understand it, what you're here testifying
10 to today has to do with what phone calls are recorded
11 and not and checking that box--

12 A. Right.

13 Q. -- is that right?

14 A. Right.

15 Q. And you don't know whether this recording that
16 you talked about plays if a phone call has been marked
17 "private." Did I understand that right?

18 A. I don't.

19 Q. Okay. Tell me again what your title is.

20 A. My title?

21 Q. Uh-huh.

22 A. I'm the sergeant in rank and I'm-- I'm the
23 Security Threat Group Coordinator. What I-- basically
24 my-- my main responsibilities is I monitor the gang
25 activity in the facility.

1 Q. Right. Have you ever had reason as part of your
2 job to monitor phone calls?

3 A. If-- if we have an investigation, ongoing
4 investigation--

5 Q. Uh-huh.

6 A. -- on an internal issue, and then the
7 investigator can ask me and has asked me to monitor
8 phone calls.

9 Q. Has a U.S. Attorney or federal law enforcement
10 agent ever asked you to monitor phone calls?

11 A. No, ma'am.

12 Q. All right. When the U.S. Attorney or federal
13 agent ask for copies of phone calls, does that go
14 through you?

15 A. Yes, ma'am.

16 Q. And tell me about that process.

17 A. What they'll do is they will send me a subpoena--

18 Q. Uh-huh.

19 A. -- with the inmate's name, federal ID number,
20 the-- it may be a specific phone number, it may be just
21 a series of dates.

22 Q. Uh-huh.

23 A. And they'll-- they'll ask for a particular date
24 beginning until this particular date. And then I can
25 pull those up in the system and download them into a

1 database. And I have to request permission from Securus
2 to get those. Once I get those back, then I can-- I can
3 burn them onto a DVD and then I-- I transport those to
4 the-- whoever.

5 Q. So it would not be a situation where you would
6 give them some sort of access code to go to Securus
7 directly and listen to those?

8 A. Yes.

9 Q. And you would maintain a copy of any record of
10 requests for phone calls, copy of the subpoena, for
11 example?

12 A. The subpoena I would keep, yes.

13 Q. And as I understand from your description, you
14 can be very selective and particular about what phone
15 calls, what phone numbers, what inmates; is that right?

16 A. That's correct.

17 Q. Okay. If you know, when an attorney faxes or
18 e-mails Connie at the front desk and says, "I'd like to
19 set up a phone call or have my client call me," is that
20 call secure or is it recorded, do you know?

21 A. No, it's secure.

22 Q. So if an attorney is the one initiating this by
23 saying, "I would like my client to call," and makes that
24 request by fax or e-mail, that is not recorded?

25 A. That's correct.

1 Q. And how is that-- how does that happen? How do
2 you not record that?

3 A. Well, those-- the internal phone system that
4 the-- the employees and staff use is not on the Securus
5 platform.

6 Q. All right. So this situation, as you envision
7 it, would be sometime when they would take the client--
8 the inmate to a counselor's office to make the call?

9 A. Right.

10 Q. It's also the case that we can fax and e-mail and
11 have our client call from the pod. Correct?

12 A. Yes, ma'am.

13 Q. And if an attorney initiates that phone call and
14 has the client call in from the pod, that is recorded?

15 A. It's possible, yes.

16 Q. It's recorded unless you've marked it "private"?

17 A. Well, they-- it's been my experience generally
18 that they don't-- if they-- they want an unmonitored
19 call, that they-- they don't call and say, "Have inmate
20 so and so give me a call from the housing unit." They
21 will-- they will schedule a conference like we talked
22 about earlier.

23 Q. If it were the case that an attorney faxed or
24 e-mailed in and said, "Please have my client call me,"
25 that doesn't necessarily go through you?

1 A. No.

2 Q. Okay.

3 A. I do get copies of them. They do-- the
4 receptionist do-- does, and I maintain a file, but--

5 Q. All right.

6 A. -- but they're-- I really don't play any role in
7 it any longer. I was a counselor prior to this
8 position, so they-- they asked them to give me the
9 copies, so I get a copy of them.

10 Q. So every fax and every e-mail from an attorney
11 asking the client to call would be maintained at CCA?

12 A. Yes, ma'am.

13 Q. All right. Let's talk about terminology again,
14 the difference between recording and monitoring. You
15 know the difference between that and how your system
16 works?

17 A. I do.

18 Q. And, for example, so when CCA uses just the term
19 "monitoring," that's very specific. Correct?

20 A. Yes, ma'am.

21 Q. And when it uses just the term "monitoring," that
22 does not mean automatically also recording?

23 A. I believe the way the system works, that those--
24 those phone calls are maintained when they're made on a
25 database if they haven't been blocked. Because I can go

1 into the system and pull up a phone call that's a month
2 old--

3 Q. Uh-huh.

4 A. -- and listen to it. So it has to be recorded.

5 MS. BRANNON: May I approach the witness,
6 Your Honor?

7 THE COURT: Yes.

8 Q. (BY MS. BRANNON) If you could look at that.
9 That is one of the exhibits. It's the copy from the
10 handbook, the CCA handbook.

11 A. Uh-huh.

12 Q. If you look at the top at "Access to Telephone,"
13 it says, "Day room telephones are subject to
14 monitoring." Is that right?

15 A. Yes, ma'am.

16 Q. And in that particular paragraph, it doesn't say
17 anything about recording. Correct?

18 A. It doesn't. That's correct.

19 Q. And there's nothing in this-- well, let me back
20 up. As part of your job, are you responsible for ever
21 notifying any attorneys of the procedure to block calls?

22 A. No.

23 Q. You get the letters perhaps from some of us; is
24 that right?

25 A. Yes.

1 Q. You've gotten a few letters like that in the last
2 month?

3 A. I have a couple.

4 Q. All right.

5 A. I've gotten very adept.

6 Q. You got one from my office, too, didn't you?

7 A. I'm sure I did.

8 Q. About 70 numbers. And so when you got those
9 numbers you went through and marked "private"?

10 A. I did.

11 MS. BRANNON: May I approach again, Your
12 Honor?

13 THE COURT: Yes.

14 Q. (BY MS. BRANNON) I'm going to show you what is
15 marked as Affiant Exhibit F. It's actually an addendum
16 to Gary Hart's affidavit that's been marked and admitted
17 into evidence. Have you look at that. Who's Connie
18 Parish?

19 A. Connie Parish is the warden's secretary.

20 Q. All right.

21 MR. OAKLEY: Your Honor--

22 Q. (BY MS. BRANNON) Down at the bottom--

23 MR. OAKLEY: I'm sorry, may I see a copy of
24 this?

25 MS. BRANNON: You have a copy. It's

1 attached to Gary Hart's affidavit, Exhibit F. Would you
2 like me to--

3 MR. OAKLEY: Can I see it just real quick?

4 MS. BRANNON: Can I borrow that back?

5 THE WITNESS: Absolutely.

6 MR. OAKLEY: Thank you. Okay. Thank you.

7 Q. (BY MS. BRANNON) All right. This is a little
8 bit hard to read, but down at the bottom of the page,
9 it's a little bit different than what we have from the
10 government here today. But does that indicate that that
11 phone number has been marked "private"?

12 A. If this check mark here is under "private," I'm
13 having difficulty-- a time reading it.

14 Q. I'm sorry about that.

15 A. I'm in my third trifocal here and I'm still not
16 getting it. But that is correct. If that's-- if that's
17 what that-- that says "private," I believe that's what
18 it is.

19 Q. All right. And so if that's checked "private,"
20 that means to you that those phone calls to that number
21 would not be recorded?

22 A. That's correct.

23 Q. And that means to you-- well, checking that box
24 "private" was either done by you or someone at CCA in
25 your capacity?

1 A. That's correct.

2 Q. Because it's CCA's responsibility to do that in
3 response to a letter?

4 A. Right.

5 Q. All right.

6 A. And I see this was Matthew Collins on here, so he
7 was-- he was my predecessor. Not this time, but the
8 time before, so...

9 Q. Is Mr. Collins still with CCA?

10 A. He is not. He's with the Bureau of Prisons at
11 the FCI Leavenworth.

12 Q. Do you have anything to do with the
13 video-conferencing system?

14 A. No.

15 Q. All right. Let's talk a little bit about the
16 signage that you testified about. Did you take
17 photographs of those?

18 A. I did not.

19 Q. Do you know who did?

20 A. I did not-- I don't know.

21 Q. Do you know how specifically those signs changed
22 in August?

23 A. I-- as I understand by reading them, they-- the
24 only difference I could tell was that the-- the
25 background was red on the older ones and it was white on

1 the newer ones, and they were a little larger placard.

2 But I think they said the same thing.

3 Q. Do you know if they kept the signs that were
4 taken down?

5 A. I don't believe they removed-- I'm not sure that
6 they removed any. I think the new ones were just made
7 to-- because they needed to add some signage in
8 different places and that they-- they just put
9 additional signage up. I don't know that they actually
10 removed any. But I wasn't-- I wasn't involved in that
11 process so I could be speaking out of turn.

12 Q. Well, that's what I was about to ask you. Who
13 was responsible for the signage?

14 A. Our maintenance department did that. They were
15 instructed, I assume, by the assistant warden or the
16 chief of security to do that.

17 Q. Do you spend time now in your current job in the
18 pods?

19 A. I do. It's not nearly as-- as frequent because
20 I-- usually I'm-- when I conduct my interviews, I'll
21 just go in and pull them out and we go to an office
22 where I conduct interviews. I don't do them in the
23 units.

24 Q. Let's talk about interviews for just a second.

25 Since all of this has been going on, say within the last

1 month or so, has there been any sort of internal
2 investigation at CCA about video-recordings or phone
3 recordings that you've conducted?

4 A. No.

5 MR. OAKLEY: Your Honor, I'm going to object
6 to relevance to this particular hearing.

7 THE COURT: Overruled.

8 Q. (BY MS. BRANNON) Have you participated in any
9 sort of investigation into either the video-recordings
10 or the phone recordings at CCA?

11 A. No, ma'am.

12 Q. Do you know if there was an investigation at CCA?

13 A. Not to my knowledge.

14 Q. All right. Have you given any statements to
15 anyone about your job and your participation in phone
16 recordings at CCA?

17 A. Statements?

18 Q. Uh-huh.

19 A. I'm not sure I understand.

20 Q. Well, first of all, have you given any written
21 statements to anyone about this?

22 A. No, ma'am.

23 Q. All right. Have you been interviewed about this?

24 A. Yes.

25 Q. By who?

1 A. The-- our attorney, the attorneys that were--
2 this gentleman right here and-- and Ms. Tomasic.

3 Q. The attorneys for CCA?

4 A. Yes.

5 Q. What about the U.S. Attorney's Office?

6 A. Yes.

7 MS. BRANNON: Judge, we would make a request
8 for any Jencks Act material that might apply to this
9 witness.

10 THE COURT: Did you make statements or
11 interview notes?

12 MR. OAKLEY: We have interview notes of the
13 attorney, but not anything that was prepared by this
14 witness, Your Honor. We did, in anticipation of this
15 hearing, meet with this witness at CCA, along with CCA
16 counsel. But to my knowledge, they did not--

17 THE COURT: But you have statements he made?
18 You do have--

19 MR. OAKLEY: Nothing that he made.

20 THE COURT: All right.

21 MS. BRANNON: I think my question is whether
22 they have notes coming from an interview of him, whether
23 he actually wrote them or not.

24 THE COURT: Did you--

25 MR. OAKLEY: We have our notes, but they are

1 not Jencks material. No one asked this witness to
2 review the notes to affirm any of the information in the
3 notes. That our notes would be, of course, work
4 product.

5 THE COURT: All right. I understand.

6 Q. (BY MS. BRANNON) Were you asked to review
7 anything before you testified today?

8 A. No.

9 Q. The photographs, anything like that?

10 A. No.

11 Q. All right. Getting back to the signage for just
12 a minute. You don't have any role or participation in
13 what the signs actually read?

14 A. I do not.

15 Q. Okay. And do you know who's responsible for
16 that?

17 A. I do not.

18 MS. BRANNON: Could I have just a moment,
19 Your Honor?

20 THE COURT: Yes.

21 Q. (BY MS. BRANNON) All right. So, for example,
22 when you got our letter from our office asking that
23 these certain numbers be private and not recorded, and
24 you put those into the system, was there anything in the
25 system that would alert you that those had previously

1 been marked as "private"?

2 A. Yes, they-- it would-- once I put it in
3 initially, it will-- it will usually flash a second
4 screen back for me to be able to check it. If that
5 number is already in there, then it will give me a
6 bigger screen and it will show me that that number has
7 already been put in.

8 Q. And that sort of information, is that stored on
9 the computer so that if you did it again, that would be
10 available?

11 A. It should be, yes.

12 Q. Okay. Is there any reason that-- anything at CCA
13 that would go through and take that information out say
14 on a cyclical basis?

15 A. Not to my knowledge, ma'am, no.

16 Q. When you are trying to enter a number that has
17 been marked-- that you want to mark as "private," is
18 there any sort of error message that ever comes up?

19 A. No.

20 Q. Would you ever get any sort of message, other
21 than to let you mark it as "private" and some indication
22 that it had been marked previously?

23 A. That would be it.

24 MS. BRANNON: May I approach one more time,
25 Your Honor?

1 THE COURT: Yes.

2 Q. (BY MS. BRANNON) I'm going to hand you what's
3 been marked Exhibit 451. Just for abbreviation, sir,
4 this is an affidavit from Gary Hart, which basically
5 says that he had contacted CCA, asked to have his number
6 blocked, he was given that sheet from Connie that
7 verified that his number had been blocked.

8 Can you explain how his phone calls would still
9 be recorded, despite the fact that they had been
10 blocked, marked as "private"?

11 A. I cannot.

12 Q. If for some reason the U.S. Attorney or a federal
13 agent had contacted Securus to change that so that those
14 phone calls could be recorded, would you know that?

15 A. No.

16 Q. If that had happened, would that screen where it
17 had been marked "private" change?

18 A. After I-- after I initially put the number in,
19 then it would-- like I say, it would come back and show
20 me that it had already been put in there. But that
21 would be the only way I know. I'd have to initially go
22 in there to check.

23 Q. If Securus did anything on their end to change
24 what was being blocked or private, would you know that?

25 A. I would assume that they would notify me that

1 that-- something like that had happened, but I--

2 Q. Has that ever happened?

3 A. No, not to my knowledge. Not since I-- not
4 during my position.

5 Q. So if the attorney has asked for the number to be
6 not recorded, you've gone in and marked "private," and
7 those phone calls are still recorded, you don't have any
8 idea how that happened?

9 A. No, ma'am.

10 Q. All right.

11 MS. BRANNON: I think that's all. Thank you
12 very much.

13 REDIRECT EXAMINATION

14 BY MR. OAKLEY:

15 Q. You have not-- do you have any reason to believe
16 that the U.S. Attorney's Office contacted Securus and
17 asked them to record phone calls that were blocked?

18 A. No one-- no reason to, no.

19 Q. I do want to talk to you about one thing. On
20 cross examination, counsel asked if-- if you reviewed
21 any photographs during the pretrial interview on Friday.
22 Now, we did show you what we anticipated to be exhibits
23 in this case. Correct?

24 A. These.

25 Q. The photographs that are in front of you.

1 A. Okay, yeah. I do recall that, yes.

2 Q. Okay. But other than-- you didn't provide us
3 with any notes or anything of that?

4 A. No.

5 Q. Correct?

6 A. No.

7 Q. Okay.

8 MR. OAKLEY: No further questions, Your
9 Honor.

10 THE COURT: All right. He can be excused?

11 MS. BRANNON: Yes.

12 THE COURT: All right. Thank you.

13 THE WITNESS: Thank you.

14 THE COURT: You can call your next witness.

15 MS. TOMASIC: Before we call our next
16 witness, I just want to alert the Court that on Friday
17 morning a subpoena was served on Securus at their
18 corporate headquarters in Dallas, Texas. I left a
19 voicemail with in-house counsel. She called me back.
20 And then I-- I was not in the office, so I returned her
21 call and left a voicemail letting her know that she had
22 been subpoenaed, please contact me if she had any
23 questions about the subpoena, but that the hearing was
24 today.

25 No one showed up from Securus, and I believe

1 we should take that matter up perhaps at the end of the
2 hearing. But the government did put forth an effort to
3 get someone from Securus here to answer those questions.

4 THE COURT: All right. You can come
5 forward. Yes.

6 MR. OAKLEY: I'm sorry. The United States
7 would next call Laurie Harrison.

8 LAURIE HARRISON,
9 called as a witness on behalf of the Government, having
10 first been duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MR. OAKLEY:

13 Q. Ma'am, would you please tell the Court your full
14 name and spell it for the court reporter?

15 A. My name is Laurie Harrison. And I'm an R&D
16 intake officer at CCA. My name is spelled L-A-U-R-I-E.
17 And my last name is Harrison, H-A-R-R-I-S-O-N.

18 Q. And how long have you been employed at CCA?

19 A. I've been there nine years. And I've worked in
20 the R&D department and transportation department for
21 eight of those years.

22 Q. What do you currently do?

23 A. I'm in receiving and discharge, which is R&D. I
24 intake the inmates that are brought in from like the
25 federal courthouses. We do in-process county inmates,

1 state inmates into our facility.

2 Q. Okay.

3 A. I'm also one that will release the inmates from
4 our custody per the marshal's request.

5 Q. Okay. I want to talk to you about your job
6 duties as it relates to receiving inmates.

7 A. Okay.

8 Q. Are you familiar with what is told to inmates who
9 first arrive at CCA concerning the monitoring of their
10 phone calls by CCA?

11 A. Yes, sir, I am.

12 Q. And what-- how is it that you're aware of that?
13 Do you participate in that process?

14 A. Yes, sir, I do.

15 Q. And explain for the Court how that happens.

16 A. When we in-process the inmate, we are-- we're
17 given a information sheet by the marshals service or
18 whoever they're being in-processed from, whatever
19 division, marshals or whatever. That information sheet
20 tells us everything that we need to know about the
21 person that's being in-processed. We put all that
22 information into our system.

23 And then once we've talked to them and discussed
24 that, we have what's called a intake booking packet for
25 the inmates. It goes over what they'll be issued when

1 they're there, how our phone call system works, how our
2 mail system works. And they pretty much are-- have it
3 all explained to them. And they sign all these
4 individual pages stating, yes, I received these garments
5 or, yes, I received this, I understand this is how the
6 phone calls work, I understand this is how the mail goes
7 in and out of your system. So, I mean-- and we explain
8 everything step-by-step.

9 Q. Okay.

10 MR. OAKLEY: May I approach, Your Honor?

11 THE COURT: Yes.

12 Q. (BY MR. OAKLEY) I'm going to hand you what's
13 been admitted as Government's Exhibit No. 1.

14 A. Okay.

15 Q. Are you familiar with that form?

16 A. Yes, sir, I am. This is our telephone monitoring
17 paper that is in the booking packet that one of the
18 inmates will sign when they are brought into the
19 facility.

20 Q. And that's a-- a form that hasn't been signed by
21 anyone. That's an example of the form that you go over
22 with inmates; is that correct?

23 A. Yes, sir, that's right.

24 Q. Now, you said that every inmate during the
25 receiving process-- that you go over that form with

1 them. Now--

2 A. Yes, sir, we do.

3 Q. -- do you do that both verbally and in writing?

4 A. Yes, sir.

5 Q. Explain for us how you go over the form verbally
6 with the inmate.

7 A. If you were to come in, I would say, "This here
8 will explain to you that all phone calls are being
9 monitored through our system." And then the person that
10 we explain to will sign the top line. And then the
11 officer that explained it will sign the bottom line and
12 then also print their name on there. So if their
13 signature is sloppy and unreadable, it also has their
14 printed name.

15 Q. Okay. And so you go over that both verbally and
16 provide the written form to the inmate?

17 A. Yes, sir. They have the option to read that.
18 And we pretty much just tell them that what I have said
19 is what's on that form, but you have the option to read
20 it.

21 Q. Okay. Then you said that you have the inmate
22 sign. Do you ever have a situation where an inmate
23 refuses to sign the form acknowledging that--

24 A. Yes, sir.

25 Q. -- they understand?

1 A. Yes, we do.

2 Q. What do you do in that circumstance?

3 A. Where they sign their name, we would put "refused
4 to sign" or "inmate refused to sign." And then we still
5 sign our name and we still print our name.

6 Q. And why is it that you sign the form if the
7 inmate refuses?

8 A. So that-- so if my boss or anyone has an issue
9 with, you know, did this-- why is this not signed, they
10 have who to go to and ask, "Okay, are you sure the
11 inmate refused?" And, you know, if any questions arise,
12 then he's able to go to that person and say, "Is this
13 what went on? What was the issue of them not signing
14 any of the lines?"

15 Q. Now, is their refusal to sign taken as a refusal
16 that their phone calls will not be recorded?

17 A. No. We still will record phone calls.

18 Q. And is the inmate aware of that fact--

19 A. Yes.

20 Q. -- even though they refuse to sign the form--

21 A. Uh-huh, yes.

22 Q. -- acknowledging that they understand?

23 A. Yes, they are.

24 Q. And so when refusal happens, do you do anything
25 that would-- would lead the inmate to believe that their

1 phone calls are now not recorded?

2 A. Huh-uh. No.

3 Q. As part of the intake process--

4 A. Uh-huh.

5 Q. -- when an inmate arrives at CCA, are the-- are
6 they ever provided a handbook?

7 A. Yes, they are. They'll see a unit team within
8 the first couple days of their being at CCA, and they'll
9 be issued a handbook at that time. Usually the unit
10 team person will ask them, you know, if you have any
11 questions about the handbook or the way things are done,
12 they will let them know.

13 Q. And so they're not given a handbook during the
14 intake process that you go through, the signed form?

15 A. No.

16 Q. But they're given one shortly after arriving at
17 CCA?

18 A. Yes. Yes.

19 Q. I'm going to show you what's been admitted as
20 Government's Exhibit 2. Is that a copy of the handbook
21 that's given to the inmates?

22 A. Yes, sir, it is.

23 Q. And if I could direct your attention to Page 10
24 of that handbook. Is that the page that discusses CCA's
25 policy concerning recording of phone calls?

1 A. Yes, it is, sir.

2 MR. OAKLEY: Your Honor, I have no further
3 questions.

4 CROSS EXAMINATION

5 BY MS. BRANNON:

6 Q. I'm sorry, just one second.

7 A. No, you're fine.

8 Q. All right. I'll go ahead, and let me ask you
9 this; before you testified today, did you review
10 anything?

11 A. Huh-uh, no, ma'am.

12 Q. And who have you met with about this?

13 A. Just the woman behind you in the gold, the
14 gentleman that was questioning me, and there was one
15 other person.

16 Q. All right. And was that last Friday?

17 A. That was Friday, yes.

18 Q. Is that the only time you've been interviewed
19 about this?

20 A. Yes.

21 Q. Has anybody at CCA interviewed you about any of
22 this?

23 A. No.

24 Q. If I understand, the review of the inmate
25 handbook you don't have anything to do with?

1 A. I know some of the stuff that's in here--

2 Q. Uh-huh.

3 A. -- but I don't know into detail.

4 Q. Okay. So, for example, Government Exhibit No. 2,
5 do you have that in front of you, the cover of it? The
6 date on that is what?

7 A. Let's see. It's February 3rd, 2016.

8 Q. Do you have any idea what previous versions
9 would've been like or how they would have been different
10 than this?

11 A. No, I don't.

12 Q. When an inmate is at intake, how long does that
13 usually take, what's the average?

14 A. They are usually with me for about 45 minutes.
15 And then we put them in what's called a holding cell
16 until medical is ready to see them. And it's usually
17 probably I want to say two hours at the most. It just
18 depends on how many inmates we have come in at a time.

19 Q. Sure. Sure. How many pieces of paper do they
20 have to sign?

21 A. There are eight "X"s in a booking packet that
22 they have to sign. And the booking packet can total
23 anywhere from 12 to 14 pages.

24 Q. Uh-huh. And Government Exhibit No. 1, this form,
25 is that part of the booking packet?

1 A. Yes, ma'am.

2 Q. If we could look at this just for a minute and
3 kind of walk through it.

4 A. Uh-huh.

5 Q. Do you know how long this particular version has
6 been in effect?

7 A. They just updated our operating system for this.
8 But as long as I've been in receiving and discharge,
9 there has always been the phone call paper and the mail
10 paper in the packet.

11 Q. Pretty much in this same form?

12 A. Uh-huh.

13 Q. All right. I want to ask you some questions
14 here. If you don't know the answer, don't worry about
15 it.

16 A. That's fine.

17 Q. But let's go through it line-by-line.
18 Community-- or "Corrections Corporation of America
19 reserves the authority to monitor."

20 A. Uh-huh.

21 Q. Do you know what "reserves the authority" means?

22 A. Not really, but--

23 Q. Do you explain that to the inmates?

24 A. I do the best I can.

25 Q. Okay. Do you read through this line-by-line? I

1 may have missed that in your direct.

2 A. I don't. I give them a short form and then I--
3 but I also allow them the opportunity to read it.

4 Q. Sure. So monitoring, this includes recording of
5 conversations on any telephone located within the
6 institution?

7 A. Yes, ma'am.

8 Q. That means the phones in the pods, as well as
9 counselor's office?

10 A. I do not know that the counselor's phones are
11 monitored. I know that the housing units have-- their
12 phone calls are monitored.

13 Q. So when it says "any telephone," do you know what
14 else that would include?

15 A. As far as I know, it would be any phone in the
16 facility.

17 Q. All right. And the monitoring, if they're
18 reading this, is to be done to preserve the security and
19 orderly management of the institution?

20 A. Yes.

21 Q. Do you know what that encompasses?

22 A. Yes. We have some that-- some people that have
23 tried to have outside communications to like harm
24 district judges and such.

25 Q. Is there any form-- anything you go with--

1 through with them that explains to them that recorded
2 phone calls would be made available to the United States
3 Attorney's Office?

4 A. No.

5 Q. Is there anything you go through with them that
6 explains that these recorded phone calls, or even
7 monitored phone calls, might be made available to
8 federal law enforcement agents?

9 A. No.

10 Q. So what you review with them is that it could be
11 recorded for basically security and the administration?

12 A. Yes.

13 Q. All right. And it says, "An inmate use of
14 institutional phones constitutes a consent to this
15 monitoring."

16 A. Uh-huh.

17 Q. And by "monitoring" there, it doesn't also say
18 recording there, but is it explained that way or do you
19 make a distinction between monitoring and recording at
20 that point?

21 A. No, we don't.

22 Q. All right. Do you have anything to do with the
23 process about contacting a unit team to request an
24 unmonitored call?

25 A. No, I don't.

1 Q. When you start the intake, you said that there's
2 a form that tells you everything you need to know. Does
3 it identify who their attorney is?

4 A. No, it doesn't.

5 Q. All right.

6 A. It gives me like their charges.

7 Q. Uh-huh.

8 A. Their height, their weight, eye color, hair
9 color, maybe previous charges, previous incarceration,
10 other jails or facilities they may have been at, that
11 type of stuff.

12 Q. And so on this paper as well, it says, "A
13 properly placed phone call to an attorney is not
14 monitored." Right?

15 A. Uh-huh.

16 Q. And again, monitored on this piece of paper
17 includes recording. Right?

18 A. (Nods head up and down).

19 Q. At the intake, you don't have anything to do with
20 explaining how they get a properly-- how they properly
21 place a phone call to an attorney?

22 A. No, we don't.

23 Q. All right. If an inmate-- well, whether or not
24 an inmate signed one of these forms, it would go into
25 their file; is that right?

1 A. Yes, ma'am. Uh-huh.

2 Q. Is there any other part of the intake procedure
3 that you've described that talks about attorney-client
4 visitation?

5 A. No, ma'am.

6 Q. Do you talk about video-conferencing, anything
7 like that?

8 A. No.

9 MS. BRANNON: Could I have just one moment,
10 Your Honor?

11 THE COURT: Yes.

12 Q. (BY MS. BRANNON) Have you ever had an occasion
13 for someone to refuse to sign it because they said they
14 didn't understand the form?

15 A. No.

16 Q. What happens when someone comes in who, for
17 example, is illiterate, do you know that necessarily?

18 A. Yeah, we explain it to them.

19 Q. Okay.

20 A. We ask-- you know, a lot of them will tell you
21 that, "I can't read this." So we will read it for them.

22 Q. Okay. In that case, you read it to them or do
23 you just explain it pretty much in a short form?

24 A. No, I-- I personally read it to them.

25 Q. Okay. What do you do if they don't speak

1 English?

2 A. We have a officer that works in receiving and
3 discharge that does speak Spanish.

4 Q. Do you have these forms in Spanish?

5 A. Yes, we do.

6 Q. Okay. Are there any other forms or other
7 information you review with them that has to do with the
8 telephones themselves?

9 A. No, ma'am.

10 Q. Do you issue a PIN number?

11 A. Yes. It's usually a computer-generated number
12 and it's attached to their ID. Like let's say their
13 number is 1234567, and then the last four numbers after
14 those will be computer-generated. That will be their
15 PIN number.

16 Q. Do those PIN numbers have anything to do with
17 anything other than phone calls?

18 A. No.

19 Q. Okay. Thank you.

20 A. Uh-huh.

21 THE COURT: Anything more?

22 MR. OAKLEY: No, Your Honor.

23 THE COURT: All right. You can be excused.

24 Thank you. All right. So that completes your evidence?

25 MS. TOMASIC: No, Your Honor. The

1 government has an additional witness, Matt Cahill, to
2 testify. I know it's nearing the time, would it be
3 possible to take a three- to five-minute break?

4 THE COURT: How long will you be with him?
5 We have some other matters to take up besides his
6 testimony.

7 MS. TOMASIC: 15 minutes at the most. And
8 then there may be a proffer of additional evidence that
9 would be brief, too.

10 THE COURT: And what is Mr. Cahill's
11 testimony about?

12 MS. TOMASIC: About how the calls were
13 obtained. And he has actually viewed surveillance
14 footage, not as part of the 18 terabytes that was
15 provided, but he has viewed footage as part of this
16 investigation. And he has also listened to calls as
17 part of this particular investigation. And he is
18 familiar with the manner in which the video works;
19 whether you can zoom in, whether there's audio, and the
20 quality.

21 THE COURT: All right. We'll take a
22 five-minute break. But before we do that, I'm reminding
23 you that the grand jury subpoena on the
24 audio-recordings, I need you to submit that into
25 evidence. And you've told me that Securus has not

1 complied with the subpoena, so I would just suggest if
2 you want me to do something about that, you can file a
3 motion for an order to show cause with any relief you'd
4 like in that regard. So we don't need to take that up
5 anymore today.

6 So I'll hear from Special Agent Cahill, any
7 further proffer you have. And then I want to discuss
8 with you all the scope of the special master. Obviously
9 that's going to be the key part of my ruling, but I-- I
10 want to make a record about-- and I do know that you
11 have differing views about the scope of the special
12 master, but I want to talk to you specifically about
13 payment and-- of the special master services. And then
14 I have one other matter to take up with you regarding
15 all of this. So hopefully we'll finish at 5:00. So
16 let's take a break for five minutes.

17 (Recess).

18 THE COURT: All right. You can call Mr.
19 Cahill.

20 MS. TOMASIC: Yes. The government next
21 calls retired Deputy U.S. Marshal Matt Cahill to
22 testify.

23 DEPUTY U.S. MARSHAL MATTHEW CAHILL,
24 called as a witness on behalf of the Government, having
25 first been duly sworn, testified as follows:

1 THE COURT: Proceed.

2 DIRECT EXAMINATION

3 BY MS. TOMASIC:

4 Q. Mr. Cahill, could you please state your name for
5 the record?

6 A. It's Matthew Cahill.

7 Q. And you are now retired?

8 A. Yes, ma'am.

9 Q. And where did you work before you retired?

10 A. Here in the District of Kansas marshals office.

11 Q. How long did you work in the marshals office?

12 A. 31-and-a-half years.

13 Q. As part of your employment as a deputy marshal,
14 were you ever involved in any investigations at CCA?

15 A. Yes.

16 Q. And recently were you involved in the
17 investigation at CCA?

18 A. Yes.

19 Q. And could you please explain your role?

20 A. Back in December of 2015, my chief deputy, Craig
21 Beam, informed me that some agents had believed that
22 there was some contraband being smuggled into
23 Corrections Corporation of America and possibly staff
24 involvement. And he asked me to go down and meet with
25 the U.S. Attorney's Office and the agents.

1 Q. As part of your involvement, were you a case
2 agent acting on behalf of the U.S. Marshals Service?

3 A. Yes.

4 Q. And what type of investigative techniques did you
5 aid as part of the investigation?

6 A. We requested documents on inmates' profiles and
7 also staff. When we learned that some staff may be
8 involved, tried to identify which staff may or may not
9 be involved, get their personnel records, where they
10 worked, telephone calls, things like that.

11 Q. Did you ever obtain video-recordings from CCA
12 that depicted either the interior or the exterior of
13 CCA?

14 A. I did.

15 Q. What particularly do those areas depict?

16 A. The only video-recordings I ever received myself
17 and-- and viewed was the law library video. There was
18 video of the outside parking lot, one video that I
19 reviewed there for a particular reason, and also I was--
20 I saw one video of the visitation room with only one
21 staff member that was present in that visitation room.

22 Q. Did you ever obtain any video-recordings of the
23 interview rooms, also known as the attorney-client
24 meeting rooms?

25 A. Never did.

1 Q. The footage you obtained, how did you get it?

2 A. I would request it through the investigator at
3 CCA. And she would either take care of it herself by
4 sending the information to me or she would have a couple
5 of her staff members that worked there with her in the
6 investigation section send it to me.

7 Q. And you said that you reviewed some of these
8 video-recordings. Correct?

9 A. I did.

10 Q. Could you just briefly describe the quality of
11 the video-recordings?

12 A. The quality of the video was very poor. It's
13 very grainy. I had trouble identifying some inmates
14 that-- I may have even had a photo of the inmate I was
15 looking for in the law library, but the video was very
16 grainy. The video that I-- that I watched the parking
17 lot of CCA was so poor that I couldn't make out-- I had
18 to ask for extra video for it. But-- and it does--
19 while I was watching that video, whoever was running the
20 camera at the time would sometimes zoom in to certain
21 parts of the parking lot and would take me off of the
22 vehicle that I was probably looking at.

23 Q. Uh-huh.

24 A. But the video was so poor, I couldn't see when
25 people came by cars, if they could put anything on a

1 vehicle or not.

2 Q. Did you as the viewer have the capability of
3 zooming in on anything?

4 A. I did not.

5 Q. Was there any audio in any of the recordings you
6 obtained in your entire career from CCA?

7 A. There was not.

8 Q. Now, turning to inmate phone calls, did you
9 obtain inmate phone calls as part of this investigation?

10 A. I did.

11 Q. Did you review a number of inmate phone calls?

12 A. I would say somewhere between-- I listened to
13 somewhere between 500 to 1,200 phone calls.

14 Q. And that is specifically as part of this
15 investigation?

16 A. Yes.

17 Q. Did you encounter any phone calls from an inmate
18 outbound to an attorney as part of this investigation?

19 A. Towards-- I retired at the end of June. I would
20 say sometime in maybe late May or early June I listened
21 to one phone call where it was a female inmate that was
22 brought up in this investigation, had made a phone call.
23 And when the-- and I was going down from phone call to
24 phone call, one after another, and some calls are 15
25 minutes long and some are ten seconds long. As soon as

1 the Securus radio went off-- or the by line or whatever
2 they say on there, the inmate asked-- the person that
3 picked up said "law offices," and then I-- I went to the
4 next call.

5 Q. Did you make any notes suggesting that you had
6 encountered an attorney call in your notes?

7 A. I made a note that it was an attorney call. That
8 was it. Attorney call. And then it was-- then I
9 stopped.

10 Q. And you stopped listening immediately?

11 A. Yes.

12 Q. Did you encounter any other attorney calls during
13 the course of your review of all those inmate calls?

14 A. I did not.

15 Q. What was the purpose of obtaining and reviewing
16 the inmate calls as part of this investigation?

17 A. To try to identify who was involved, either on
18 the inside or the outside, in bringing in contraband
19 into the facility. And-- and part of the job of the
20 marshals service is for the security of the facility,
21 the staff in the facility, the other inmates in the
22 facility, and-- and for law enforcement and for deputy
23 marshals that are handling prisoners in the facility.

24 Q. Were you able to glean any useful information
25 from the inmate calls that aided the investigation?

1 A. Yes.

2 Q. What was the purpose of obtaining the video
3 footage generally?

4 A. Generally is to find out if-- if an inmate was--
5 try to identify who was involved, where the-- where the
6 contraband was being stored, where it was being
7 distributed within the facility and who was bringing it
8 in.

9 Q. Did you ever obtain any video footage to aid in
10 corroborating a cooperator's statement?

11 A. Yes. Yes.

12 MS. TOMASIC: Just one moment, Your Honor.

13 No further questions.

14 MR. REDMOND: Thank you, Your Honor.

15 CROSS EXAMINATION

16 BY MR. REDMOND:

17 Q. Mr. Cahill--

18 A. Yes, sir.

19 Q. -- we've heard testimony today that there was a
20 proffer session conducted in mid-March with a
21 cooperating witness. Were you present at that proffer
22 session?

23 A. I would have to-- I was present at several
24 proffer sessions, but not all of them. So I would-- I
25 would have to know--

1 Q. I don't know a name.

2 A. Well, I-- I wouldn't know unless I--

3 Q. It's been described as a very lengthy proffer
4 with somebody who seems to be a fairly central
5 government witness. Does that help you at all?

6 A. There was several lengthy proffers. I usually
7 try to get out of those somehow.

8 Q. Okay.

9 A. But-- and you say this was when?

10 Q. Mid-March.

11 A. Yeah, I was probably involved-- I was probably
12 there, yes.

13 Q. Okay. And were you there when the cooperating
14 witness talked about how the attorney-client visitation
15 rooms at CCA were video-recorded?

16 A. You know, I've might've been. During these
17 proffers, I-- I didn't do a whole lot of proffers in my
18 31 years, mainly I relied on the other agents to do
19 that. And they were-- all these proffers were
20 generally-- notes were taken by them or recordings were
21 done in some of the proffers, too.

22 Q. Okay.

23 A. So I may have heard-- but when-- sometimes we go
24 in and out of the-- to go obtain other things or go get
25 a drink of water or go to the bathroom or something like

1 that. I may have been present when that happened.

2 Q. Do you have any independent recollection of that?

3 A. I've been to so many of them, that was not
4 something that-- that could happen. I can't say for
5 sure that I was-- that I was there or that I recall that
6 being said.

7 Q. You did not prepare a report of that proffer?

8 A. I probably did not.

9 Q. Okay. Okay. I want to just back up just to get
10 as much detail as I can about exactly the process that
11 the marshals office goes through when it's obtaining
12 phone calls from CCA.

13 A. Okay.

14 Q. Who is it that you call, do you remember a name?

15 A. The investigator? At CCA?

16 Q. Yeah, if you want somebody's phone call, if you
17 call CCA, who are you asking for?

18 A. Generally the investigator, Deborah Kinney.

19 Q. Okay. And the-- you testified that she had a
20 couple of folks that worked with her that could help you
21 out sometimes?

22 A. Yes. And I believe Sergeant Bigelow, who
23 testified. However, I-- I dealt with generally Ken
24 Lajiness, who was-- worked for Deborah Kinney, and I
25 think Sergeant Bigelow worked there, too. But I had

1 only a couple of occasions that I-- that I requested
2 stuff from Sergeant-- I probably requested it through
3 Deb Kinney and maybe Sergeant Lajiness, or Ken Lajiness
4 was not available and may have given it to Sergeant
5 Bigelow.

6 Q. Okay. So when it comes to you, how does it come?
7 Is it on a disk?

8 A. It generally comes on a disk, yes.

9 Q. Okay. And is it-- is it always like that?

10 A. Yes.

11 Q. Do you have-- I mean, we've heard some testimony
12 that when Securus records a phone call and CCA wants to
13 give somebody access to that phone call, they're sent a
14 link and then you can open that link and the phone calls
15 are available. You don't do it that way?

16 A. I've never done it that way.

17 Q. Okay. So you just--

18 A. That I recall. I don't think that I've ever done
19 it that way.

20 Q. Okay. So you call CCA, you request particular
21 phone calls on a person or a number; is that right?

22 A. Yes, sir.

23 Q. And then a disk is sent to you. Do you know by
24 who?

25 A. I'm assuming it's the one who prepared it. And

1 some-- because of the nature of some of the calls, I
2 think they try to not-- if it's-- particularly in this
3 investigation, if it's-- because there's CCA staff
4 possibly involved, that generally comes right from the
5 people who prepared it. And they will put a name on it,
6 either my name or put Patricia Cook's name, who's our
7 COTR up there, or Brett Hoffer, who is assigned to
8 basically oversee the-- a lot of the things that happen
9 with CCA.

10 Q. Okay. And so how long between the time that you
11 make the request and then you receive the disk, how
12 long?

13 A. Generally, if-- depending on the-- the time that
14 we request it and/or the volume of the request,
15 generally it's pretty-- pretty quick. It's usually by
16 the next day.

17 Q. Okay. And there's no subpoena involved?

18 A. There's generally just a-- a letter from the--
19 CCA sending this to us and we sign off on it. So
20 whoever receives it downstairs signs off that they
21 received it.

22 Q. Downstairs where?

23 A. In the marshals office, yeah.

24 Q. Okay.

25 A. Because it comes through their-- it comes from

1 transportation. They put it with the transportation
2 officers when they're bringing it down.

3 Q. Okay. And so when that disk shows up, is there
4 any paperwork memorializing the transfer of the disk
5 from CCA to the marshals office?

6 A. Generally I'm not down there, so...

7 Q. Is there any that you're aware of?

8 A. I believe there is, but I'm-- I'm not the one
9 that sees that. I'm not the one that signs for it.

10 Q. Okay. And so who are you picking up from in the
11 marshals office?

12 A. Generally somebody down-- whoever receives it is
13 working the-- the cell block or working down in the
14 marshals office, they generally send it upstairs and
15 either put it in my box or my desk. Or what used to be
16 my desk.

17 Q. Okay. Let's talk about video. Sort of the same
18 questions. If you want video from CCA, are you calling
19 Investigator Kinney?

20 A. I'm requesting either-- either by phone or by
21 e-mail, generally, yeah, that's the way it goes.

22 Q. Okay. And we heard some testimony I think at the
23 hearing on the 9th from a CCA employee that because the
24 marshals sort of, you know, fund CCA, they consider
25 their property your property. Is that sort of both

1 ways?

2 A. Yeah, I don't-- I don't know anything about that,
3 but--

4 Q. What you know is you can call--

5 A. All I know is the CCA is a-- a contract facility
6 that the marshals service uses.

7 Q. Sure.

8 A. And I don't know that-- we don't have any say so
9 over their staff or anything like that. I mean, we
10 don't-- if that's what you're asking.

11 Q. No. My-- my point is narrower. If you call them
12 and say, "I want these phone calls"--

13 A. Yes.

14 Q. -- they will send you those phone calls?

15 A. Yes, sir.

16 Q. If you call them and say, "I want these videos,"
17 they will send you those videos?

18 A. Generally. Depending on what it is.

19 Q. Has there ever been a time where they said no?

20 A. None that I can think of, but--

21 Q. Okay.

22 A. -- generally we don't-- videos are something we--
23 that are usually requested when we get something from
24 CCA a lot of times where they tell us, hey, we had a
25 stabbing incident in, you know, Pod-- F Pod, or

1 something like that, and we also had an-- an officer
2 that was injured during that and we found contraband
3 in-- in C Pod or something like that. And they-- and if
4 we have video of it, then they'll-- we'll request the
5 video of that and they'll send a copy of that to us.

6 Q. And it follows the same sort of route, transport
7 brings it?

8 A. Yes.

9 Q. Okay. Okay. We heard some testimony earlier,
10 some I guess answers to the Court's questions earlier
11 today that involved an investigation of an attorney who
12 was contacting clients at CCA who he did not represent,
13 I'm assuming it's a he, did not represent. Were you
14 involved in that investigation?

15 A. I was not.

16 Q. Okay. Were you aware of its--

17 A. Not until I heard about it today.

18 Q. Okay. You testified briefly about the process of
19 sort of minimizing a phone call. You have a-- you're
20 listening to the recorded phone calls, you hear an
21 attorney-- or you identify an attorney because someone
22 says "law office." Right?

23 A. Yes.

24 Q. And was there never a conversation that you got
25 15, 20, 30 seconds into-- into before you realized it

1 was a lawyer?

2 A. Myself, no. That was-- that was the only-- and I
3 would say probably in my 31 years, that may have been
4 the only call that I've ever listened to that was an
5 attorney's office.

6 Q. And--

7 A. And I didn't listen to it. The lady who answered
8 the phone said "law offices," and I couldn't even tell
9 you what law office it was or whatever. I stopped the--
10 that call and went to the next call.

11 Q. Okay. But there was never a time, you testified,
12 where you realized later on in the phone call that it
13 was a phone call between an attorney and a client?

14 A. Never. Myself, never.

15 Q. Okay. You testified, if I'm correct, that you
16 were completely unaware that there was any
17 video-recording capability of any attorney-client room
18 at CCA; is that right?

19 A. I didn't testify to that. But I didn't-- I've
20 never viewed any attorney-client-- I never viewed any
21 visitation room video at all, other than after the
22 search warrant was conducted at CCA, we got-- I was
23 contacted by the investigator at CCA to say that, hey,
24 one of our staff members claims that they found
25 contraband in the visitation room.

1 Now, whether that was the attorney-client
2 visitation room or whatever, and I said, "Please send me
3 the report. What was the contraband that was seized?"
4 And I asked them for the video that they had.

5 And quite honestly, the video was a-- you were
6 looking through the windows. You could only see waist
7 high. And you could see the staff member walk along the
8 windows, pick up something on the ground, you couldn't
9 see what it was, and walk back out. So I couldn't see--
10 and there was no other-- no other inmates, there was no
11 attorneys, there was no staff, other than this one staff
12 member. That's the only time I ever reviewed a
13 visitation room video.

14 Q. But you don't know that that was an
15 attorney-client visitation room?

16 A. I don't know that.

17 Q. Okay. Are we talking about a-- sort of a big
18 rectangular room with a bunch of different windows?

19 A. All I could see, it looked like there was chairs
20 on this. There was a-- there was a wall that was
21 probably waist high--

22 Q. Uh-huh.

23 A. -- walking along. And I could see the windows on
24 the other-- windows and the staff member was on the
25 other side of that wall, and the windows, walking past,

1 picking up something, and walking back out.

2 Q. Okay. And so this sounds like a room that could
3 accommodate a fair amount of people?

4 A. All I could-- all I could tell from the-- because
5 the video basically showed a staff member walking past
6 maybe three or four windows, with a separation in
7 between them.

8 Q. Okay.

9 A. So I don't know, I've never been in the
10 visitation room that I can recall. So I don't know if
11 that's an attorney-client visitation or if it's a
12 family-client visitation.

13 Q. Okay. There has been some testimony about the
14 capability of the cameras in the attorney-client rooms
15 that could tilt and pan and zoom. Was that capability
16 present on the videos that you received?

17 A. No.

18 Q. And the--

19 A. Now, whether it was capable-- whether they were
20 capable of doing it-- any of the videos that I received,
21 we did not have any capability to zoom in or zoom out or
22 anything on-- on our end.

23 Q. That's precisely what I was asking. Thank you.

24 A. Yes.

25 Q. And the-- you also testified the video quality

1 was terrible?

2 A. Yes.

3 Q. Or poor?

4 A. Yeah, very poor.

5 Q. And the-- we're talking about two cameras, the
6 visitation room and the outside of CCA?

7 A. Yes. And also the law library.

8 Q. How big is the law library?

9 A. How big is the law library?

10 Q. Yeah, big as a courtroom or--

11 A. I would say the law library-- no, it's not as big
12 as this courtroom, not even a close. Probably a quarter
13 of the size of this courtroom.

14 Q. Okay. And it was just one camera surveying?

15 A. One camera in the far corner up in the-- there
16 (indicating). So when the inmates would come underneath
17 the camera, you could barely see what they were doing.

18 Q. Okay. So--

19 A. Yeah. So it was one camera and it-- it did not
20 zoom.

21 Q. Okay.

22 MR. REDMOND: Could I have just a second,
23 Your Honor?

24 THE COURT: Yes.

25 MR. REDMOND: Thank you, sir. Those are all

1 my questions, Your Honor.

2 THE COURT: Thank you. Anything more?

3 MS. TOMASIC: Just one question, Your Honor.

4 REDIRECT EXAMINATION

5 BY MS. TOMASIC:

6 Q. Mr. Cahill, is it your understanding that the
7 U.S. Marshals Service is tasked with maintaining the
8 safety and security of the facilities with which it
9 contracts?

10 A. Yes.

11 MS. TOMASIC: Okay. Thank you. No further
12 questions.

13 THE COURT: All right. Mr. Cahill, you can
14 go back to retirement for now.

15 THE WITNESS: Thank you, ma'am.

16 THE COURT: All right. Ms. Tomasic, you
17 said you had some proffers?

18 MS. TOMASIC: Yes, Your Honor. At this time
19 in-- before we move on to the proffers, the government
20 moves to admit Exhibit No. 21, which is the subpoena we
21 discussed.

22 THE COURT: Okay. And again, that one--

23 MS. TOMASIC: Move to admit it under seal.

24 THE COURT: Exhibit 21. I'm sorry?

25 MS. BRANNON: May we have a copy?

1 THE COURT: Yes, I think they should have a
2 copy.

3 MS. TOMASIC: Okay.

4 THE COURT: But we'll otherwise admit it
5 under seal. Exhibit 21 is the subpoena for the
6 audio-recordings in this case, at least the initial
7 subpoena. Correct?

8 MS. TOMASIC: And, Your Honor, I do not
9 oppose the Court's recommendation that they get a copy,
10 except that I would note that it contains the same list
11 of names we previously discussed at sidebar with respect
12 to Government's Exhibit No. 11.

13 THE COURT: Let me see it.

14 MS. TOMASIC: A shorter list, but still a
15 number of them.

16 THE COURT: I'll admit this under seal.
17 I'll allow the defendants to see a redacted version of
18 the attachment that redacts out those names that aren't
19 already defendants of record.

20 All right. So Exhibit 21 will be admitted
21 under those circumstances, so you'll need to give them a
22 copy, but redacted of the names that you're concerned
23 about. Okay. What else?

24 MS. TOMASIC: Okay. Your Honor, I would
25 like to proffer a little bit of information just to

1 supplement the Court's questions. I have not been in
2 either of the first two hearings, but I've read the
3 transcripts and I'm aware of the concerns with what I
4 knew and also my intent.

5 And what I knew and my intent are completely
6 different. I was aware, based on what a cooperator said
7 in probably a three- to five-minute conversation out of
8 two hours or more, that CCA was likely recording
9 attorney-client meeting rooms. And I learned that
10 information in early March.

11 Between that time and the time the subpoena
12 issued, I handled a wiretap, I handled half a dozen
13 search warrants. I recognized that dozens and dozens of
14 targets were being identified. And I was overwhelmed by
15 the quantity of information before me. At this point I
16 was working the case alone, Mr. Oakley wasn't on the
17 case yet. And as the Court knows, I'm a fairly new
18 attorney.

19 I did not intend to get the attorney-client
20 video-recordings. I was not circumspect and I made a
21 very serious mistake that has taken a great deal of time
22 and resources from a number of people, including the
23 Court. But I want the Court to know that I did not
24 intend to get that footage.

25 When I got the video-recordings, we were

1 amassing an enormous volume of discovery. We were
2 amassing an enormous volume of information. At this
3 point Mr. Oakley was on the case. Ms. Boyd was handling
4 discovery. And we were scrambling to keep up. And this
5 case is fundamentally different from any other case I've
6 ever worked because, based on representations from the
7 marshals and from DOJ, we had to take this case down as
8 soon as we knew that contraband was coming into that
9 facility. We couldn't work a two-year drug case. We
10 couldn't get our ducks in a row. We couldn't make
11 everything pretty and packaged correctly.

12 THE COURT: And this is something I've
13 wondered about, because I understand that you had to
14 stop-- stop it. But why you decided to file this case
15 before you had-- you've got these huge volumes of
16 discovery. I'm sure you probably didn't even realize at
17 the outset how big they are. What was the rush to file
18 this case?

19 Frankly, I've seen this happen again and
20 again with your office. You rush to file these cases,
21 the discovery is not even close to being amassed. And
22 now you're scrambling with the investigative agencies to
23 get that done, even while the speedy trial clock is
24 running. Sometimes I know it may be a bank robbery,
25 you've got to arrest them, you've got to get them off

1 the street, you've got to get them in custody, you've
2 got to have the speedy trial clock run. But I've seen
3 it happen in prospective cases, drug cases. It seems
4 like there's a rush to file it, but you don't have your
5 act together. And so now the speedy trial clock is
6 running and we're all scrambling and trying to, you
7 know, hopefully get the case discovered.

8 I have not understood-- I understand why you
9 want to do the search warrant, I understand why you
10 wanted to bring the whole thing down. But why would
11 you-- this is a rhetorical question. Why would you
12 indict these people that are already in custody? That--
13 at least most of them. That, I don't get. Because now
14 here we have, you know, at one point you said 43 or is
15 it 23 million e-mails? We've got to deal with that
16 issue, we've got to deal with the-- the computers in the
17 law library. We've got to deal with this horrendous
18 situation.

19 And in my perception, in part, something
20 that's happened here is you received a volume of
21 evidence and your response is to turn over the volume of
22 evidence to the defense with perhaps actually-- without
23 actually going through it, which creates all kinds of
24 problems and all kinds of issues when it turns out that
25 there's attorney-client communications in that evidence.

1 So it's a rhetorical question. I'm not
2 picking on you specifically, but I'm telling you that
3 I-- I've had this same question about this case and a
4 number of other cases that I've seen that creates a lot
5 of work for you, for the defense, for the Court, for
6 everybody involved. And the very worst is it creates a
7 situation where defendants are in custody with the
8 speedy trial clock running. And we're six months into
9 the case, a year into the case, 18 months into the case,
10 and the government still hasn't got their discovery out
11 to the defendants.

12 So I just say all that in the hearing of
13 your boss, the U.S. Attorney, and everybody else that's
14 in there, you all need to get your act together.
15 Because this creates all kinds of issues beyond this
16 case when you-- you have a five-year statute of
17 limitations on most of these cases, so-- these people
18 are in custody. Take the case down, but why file it
19 when you're going to have 23 million e-mails while Mr.
20 Black and others are in custody and-- and all of these
21 other issues that are arising? That, I don't get.

22 MS. TOMASIC: Your Honor, that too was a
23 very big mistake. And my assessment in charging
24 initially was to get the six core people that I could
25 get and dismantle it and stop it, which was Mr. Aiono,

1 who the government believed was bringing the contraband
2 in, Mr. Rowlette who was in custody, Karl Carter who was
3 in custody. Those two we considered leaders/organizers
4 of the organization. And then everyone else of the six
5 total who were charged were out of custody. And only
6 Mr. Carter and Mr. Black have remained in custody.

7 But that was also a mistake. We should've
8 waited, we should've gotten our ducks in a row. My
9 mindset at the time was I'm going to charge as few
10 people as I can. And the discovery seemed at that point
11 manageable, but we were working furiously. And-- and
12 again, it was kind of messy, I acknowledge that. And
13 then charge more people much further down the road,
14 either in a separate case or by superseding.

15 What I came to recognize is it was really
16 hard to parse out the discovery for these six
17 individuals with everyone else, because it was a very
18 large conspiracy. And that's when the discovery kept
19 mounting and mounting and mounting.

20 What I want to stress, though, as far as my
21 intent and my knowledge is beginning-- and that's--
22 Government's Exhibit No. 8 are a series of e-mails I
23 sent, and the Court is completely accurate, we were
24 sending stuff out, we were definitely trying to send out
25 the video-recordings without ever having looked at them

1 en masse. I hadn't looked at the index. I've been
2 trying to send that out since April 26th.

3 I've sent over a dozen e-mails to defense
4 counsel trying to push it out, trying to push it out,
5 which would've been a mistake had it been sent out
6 because they would've had access to each other's
7 attorney-client meeting rooms. But I represent that to
8 the Court to make clear I didn't have this and was
9 trying to hide it and the agents-- have the agents
10 review it and look at attorney-client meeting rooms and
11 use it. I didn't know what was on there.

12 Had I pushed it out on April 26th, as I had
13 intended to, they would've had it, they would've known
14 probably before me that we had it. And my point in
15 saying all of this is that it was a mistake and not
16 intentional. And I think I-- I know I've learned a
17 great deal from this. And I think everyone else in our
18 office has. So if anything good can come from all of
19 this, that's the good.

20 THE COURT: All right. Thank you.

21 MR. REDMOND: Your Honor, Ms. Tomasic can
22 proffer anything that she wants. I'm not here to argue
23 about her or any of the content of that statement. The
24 problem is that that's all legally irrelevant. We would
25 note an objection to any consideration of government

1 assertions as evidence in a privilege hearing. The
2 Tenth Circuit has spoken directly on this issue. We
3 have briefed this exhaustively. The government hasn't
4 breathed a word in return of any authority that the
5 Court could rely on to say that you can resolve
6 privilege issues simply by believing what the government
7 says when they don't take the stand.

8 THE COURT: All right. Thank you, Mr.
9 Redmond.

10 Well, I'm not going to resolve the privilege
11 issues now. That's-- the first step is to appoint a
12 master or an expert to help me do that and to help me
13 resolve some other matters. So before I talk about
14 that, just to make sure, has all the evidence been
15 submitted that's going to be submitted?

16 MS. BARNETT: Yes, Your Honor. Thank you.

17 THE COURT: Okay.

18 MS. BRANNON: Actually, Judge, we have a
19 problem with one of the exhibits. Government Exhibit
20 No. 2, we were provided two pages of this booklet. We
21 thought that that's what the government had given the
22 Court. Instead, they gave the Court the entire booklet.
23 We haven't had it. We haven't had a chance to read it.
24 I would suggest, kind of like the audio-recordings, if
25 the Court-- I believe the government has the original.

1 If after today we would have an opportunity just to
2 review the booklet and the audio-recordings. And we can
3 just let the Court know if we have an objection or if
4 there's a problem with them.

5 THE COURT: Well, first of all, at least-- I
6 don't know where the original is, but in my-- in my
7 notebook, all I have is Page 1, 10, and 11.

8 MS. BRANNON: They have the booklet marked
9 as the original.

10 THE COURT: As the original, all right. So
11 that's-- that's more than what I have in my notebook.
12 So do we have that entire handbook?

13 MS. BARNETT: Yes, Your Honor. Exhibit 2 is
14 right here. And we actually took it. I've spoken to
15 Ms. Brannon during the break. We took it down to our
16 office, and I apologize, we took it apart without asking
17 the Court's permission, and we actually made a copy of
18 it for her that we provided to her. But here is the
19 original that we were offering as an exhibit.

20 THE COURT: All right. So the entire inmate
21 handbook will be admitted, subject to objection by the
22 defendants once they have the opportunity to review it,
23 since they haven't had that opportunity.

24 All right. So I'm-- all of this, the whole
25 point of this hearing today was so that I would have a

1 number of questions answered, you all have submitted
2 additional evidence that would inform my ruling on the
3 appointment of a special master. You-- both government
4 and defendant before had indicated that you-- and your
5 pleadings have indicated that you agree that the Court
6 should appoint a special master, although-- and I won't
7 go into the particulars, it's all spelled out in your
8 papers. But what the defendant wants versus what the
9 government wants is very different.

10 Here's what my intent is, and I've alluded
11 to this before. To have the special master start by
12 acting as if that person is a Taint Team and going
13 through all of the audio-recordings and video-recordings
14 law library imaging, all of that, to go through that
15 with the goal of culling out attorney-client contacts
16 versus non-attorney-client contacts. And then perhaps
17 going a step further and looking at the attorney-client
18 contacts and if, for some reason, that person in their
19 expertise thinks it's not a privileged communication,
20 identifying that group and then making some sort of
21 recommendation to me.

22 To start with that I think misses the point
23 of why I think a master or an expert needs to be
24 appointed in this case. It could be ultimately that
25 that's where this person needs to go and that's what the

1 government apparently wants, but I think what the master
2 needs to start with is a determination of whether there
3 were Sixth Amendment violations, the extent of the Sixth
4 Amendment violations, CCA's involvement in the
5 violations, the U.S. Attorney's Office in the
6 violations, whether there have been any other
7 problematic violations in terms of Rule 6(e) or other
8 ethical considerations. All of which then informs me as
9 to what's the appropriate remedy.

10 If the expert says no Sixth Amendment
11 violations, you know, we don't need to get to remedies.
12 But I think we can probably agree at this point that
13 there have been significant Sixth Amendment violations,
14 although, you know, there may be some dispute-- there
15 apparently is some dispute about the audio-recordings
16 and maybe perhaps about the video-recordings, I don't
17 know.

18 But in any event, what I want this person to
19 start with is a determination based on this record, and
20 any other further investigation the person in their
21 expertise thinks should happen, to determine the-- the
22 nature of the violations, the scope of the violations,
23 the extent of the violations of Sixth Amendment and
24 other rights of the defendant. And then to go the next
25 step and help me decide what the appropriate remedies

1 would be.

2 As I sit here, there's a lot of remedies
3 that come to mind, but I guess the three categories of
4 remedies that immediately come to mind are-- would the
5 appropriate remedy be just to sanction? CCA is not a
6 party to this case. But to the extent the government
7 did something wrong, to sanction them, if that's what
8 the finding was. That might be one remedy if it were
9 appropriate.

10 Another remedy might be exclusion of this
11 evidence or exclusion of part of the evidence. That
12 might be a remedy. Another remedy might be much more
13 grave, and that might be a dismissal of the case
14 outright. That would be probably the worst remedy one
15 might consider. But that would be the second stage of
16 the determination based on the findings as to what the
17 nature, extent, and scope of the violations are and who
18 the violations were by.

19 If I then determine that exclusion of none
20 of the evidence were appropriate, then it seems like the
21 next step would be some sort of process by which this
22 neutral person would determine what's admissible and
23 what is privileged. And we would go through that. And
24 that, of course, is the most labor-intensive process of
25 all, given the-- you know, the volume of the recordings

1 at issue. So that's what my intent is.

2 The Court has no money to do this. I've
3 done a lot of checking. There-- there really is not a
4 fund for this. Given that the reason we're here is
5 because of violations perhaps by-- by CCA, which
6 contracts with the Department of Justice through the
7 U.S. Marshals Service, and given that at least there are
8 allegations that the U.S. Attorney's Office improperly,
9 whether it's intentionally or inadvertently, disclosed
10 privileged communications, it seems to me that the
11 Department of Justice should pay for this.

12 So I know the justice-- I know the U.S.
13 Attorney's Office can-- you know, agrees that there
14 should be a master appointed, but I need to make a
15 record as to whether the U.S. Attorney's Office consents
16 to the process I've just outlined. Because if that's
17 the case, then I will be entering an order and that
18 order will say that the Department of Justice will pay
19 for this process in the stages that I've described.

20 So I'll hear from you, Ms. Barnett, on that.

21 MS. BARNETT: No, Your Honor, we do not
22 consent to that.

23 THE COURT: What do you consent to?

24 MS. BARNETT: We consent to having a special
25 master look at the recordings that have been provided to

1 the Court and excise out the material that shows
2 contacts with counsel, either through the phones or
3 through the attorney-client interview rooms at CCA.
4 Excising that material out. And then the rest of the
5 material that would arguably be permissible evidence for
6 us to use and provide in discovery, then to be given
7 back to the government and to defense counsel in the
8 case so that the case could go forward.

9 THE COURT: So essentially you want to tie
10 the Court's hands and preclude me from fashioning any
11 remedy, other than to give you what you would be
12 entitled to or would want anyway, which would be to have
13 non-privileged communications and to have somebody go
14 through that and do all of that work for you?

15 MS. BARNETT: Your Honor, frankly, if the
16 issue is cost, I would certainly be willing to try to
17 sit down with the defense and try to work out another
18 solution. Maybe--

19 THE COURT: The defense can't pay for it.
20 They don't have a fund. The Court doesn't have a fund.
21 The Department of Justice has the fund. This isn't a
22 civil matter where the parties split costs. I've done--
23 I mean, I've looked into that. There's no funding
24 mechanism, other than through Department of Justice, if
25 I'm going to appoint a special master. And Rule 53 says

1 that that has to be done with the consent of the
2 parties. So you're telling me you're not going to
3 consent?

4 MS. BARNETT: No.

5 THE COURT: All right. Well, that's fine.
6 I do have another avenue in mind and I'll just-- I'll
7 just go the other avenue. Because I am going to appoint
8 someone, a master, expert, or otherwise, and I am going
9 to order Justice Department to pay for it, because
10 there's no other funding mechanism available. And we're
11 here because of Justice Department, not because of the
12 defense, not because of the Court, so...

13 All right. I-- I needed to make a record of
14 that because my order will indicate that it's not with
15 the consent of the government. I don't know if it's
16 with the consent of the defense, I need to get a record
17 from you on that as well, Ms. Brannon.

18 MS. BRANNON: We consent.

19 THE COURT: You've asked for more, I'm not
20 necessarily-- you've asked, for example, for someone to
21 investigate the policies and practices of the U.S.
22 Attorney's Office. That is not the language that I'm
23 going to use in this order. It's going to be what I've
24 just described.

25 MS. BRANNON: Judge, if I may inquire.

1 Earlier in some proceeding the Court mentioned that the
2 order would allow the special master to investigate
3 whatever was necessary and appropriate. In other words,
4 whatever this investigation might lead to, would allow
5 the special master to approach the Court as far as that
6 investigation might be necessary.

7 THE COURT: Yeah, I intend to have that
8 language. But again, as I've described, I'm not going
9 to-- I'm not thinking that the master or the expert is
10 going to start by acting as a Taint Team. They're going
11 to start with are there violations, what the extent of
12 the violations are. They can-- I mean, whatever they
13 determine, they're-- I think they should be allowed the
14 liberty to pursue and investigate to answer that
15 question, so that I can then determine whether there are
16 any remedies appropriate. I may determine that all that
17 needs to be done is what the government wants, but I'm
18 not going to start with that.

19 I'm hearing from the government they don't--
20 they don't consent to this, so I'll have to consider
21 another mechanism to have this done and paid for out of
22 the taxpayer's dollar, out of the Department of Justice
23 bucket, because there's no other bucket available, to my
24 knowledge. Okay. I appreciate that.

25 All right. So I will be entering an order.

1 I have in mind someone that I will likely appoint, but
2 I'm doing some interviewing and so that's not--
3 obviously that's within my discretion, but you'll have
4 notice of that.

5 All right. One final matter I'm going to
6 bring to you all's attention that is somewhat related to
7 this that occurred within the context of this case. And
8 it's a fairly lengthy record I'm going to make and I
9 feel the need to make this record. I've consulted with
10 judicial colleagues who-- in my view, I think I need to
11 make this record, they do too. And then at the end I'll
12 tell you what-- what this information-- you know, what
13 the consequences will be, which essentially at this
14 point won't be much.

15 All right. So, as you know, I entered an
16 order to impound evidence. On August 24th, in the
17 afternoon, Ms. Tomasic sent an e-mail to my chambers
18 requesting to deliver CCA recordings to my chambers.
19 That was Wednesday, August 24th. And my chambers, my
20 law clerks, responded they would be available most of
21 the rest-- most of the following day to receive the
22 items and asked that she give them a call or e-mail when
23 she was ready to deliver the materials, they would look
24 out for you-- for her. And Ms. Tomasic confirmed that
25 she would call the next day, August 25th, before coming

1 up.

2 And just to give you-- most of you know
3 this, most of you that practice in this court from time
4 to time have come back into chambers and have let us
5 know you were coming. There's a buzzer. The way the
6 chambers are configurated on all floors, including the
7 fourth floor where the district judges are housed, are
8 we're in a secure area. There's an outer door that no
9 one can gain access to unless they have a key. And the
10 people that have keys are chambers' staff, some clerk's
11 office staff, and the United States Marshals because
12 they are charged with security. And, you know, they
13 have master keys throughout the whole building,
14 including the U.S. Attorney's office, FPD's office, et
15 cetera, because they are in charge of maintaining the
16 security of the building.

17 So anyone else that wants to gain access
18 even to the general chambers area has to, you know, do
19 that by a buzzer and announce their presence - and there
20 are buzzers for each judge's chambers - and to announce
21 their presence. And then that particular chambers will
22 buzz them in, kind of like an apartment building. Then
23 once you get into that space, each chambers, of course,
24 has their own door. And at least here in Kansas City,
25 most of us leave our doors open to the hall during the

1 workday, because our chambers staff are going and coming
2 and sometimes chambers are going from one chambers to
3 another. But after hours we close those doors and we
4 lock those doors.

5 So on Thursday, August 25th, at about 3:00,
6 Ms. Tomasic had called chambers and said she-- asked if
7 she could deliver the items, and they conferred and said
8 yes. They buzzed her in. She delivered the items. One
9 of my law clerks buzzed her into the chambers space on
10 the fifth floor I should've said, not fourth floor. And
11 she brought a-- a very sizable amount of materials,
12 because there were-- the CCA system, I had ordered that
13 they turn over all recordings. And as part of that,
14 they had to turn over these DVR drives. And they were
15 very bulky and it took a big cart. Ms. Tomasic brought
16 all of that up. My law clerk, Mr. Treaster, was there
17 and put them in my inner-office within my chambers
18 office, and Mr. Treaster told Ms. Tomasic, "We'll put
19 them there for now." So anyway, that happened
20 August 25th at 3:00.

21 And then that was it, I mean, for that
22 point. Ms. Tomasic did not indicate-- and this was
23 about 3:00 again on Thursday. She didn't indicate that
24 there would be more or that she had additional things to
25 deliver. She didn't-- there was no conversation about

1 whether anyone would be there later on that afternoon.

2 So that was it.

3 So the next thing that happens, same day at
4 5:30 p.m., another one of my law clerks is working in
5 chambers. It's after hours, it's 5:30 of course. And
6 she-- my law clerk hears a female voice calling right
7 outside the chambers door within the outer office where
8 Bonnie Wiest is saying, "Hello? Is anyone here?" And
9 then that person says, "Oh, someone is here."

10 And so Ms. Schlacter comes out and finds Ms.
11 Tomasic with a deputy marshal, Christopher Johnson, with
12 her. And they're there at the entrance of my chambers
13 door, which startled Ms. Schlacter, because no one had
14 buzzed her in, no one had indicated that Ms. Tomasic or
15 the marshal was coming in. There hadn't been any
16 additional e-mails or calls or any indication that Ms.
17 Tomasic was needing to come up to deliver more things
18 that day. So it startled her, but, you know, they had--
19 they exchanged pleasantries.

20 Ms. Tomasic delivered to Ms. Schlacter a
21 manila envelope that was about an inch thick and then
22 also a white business envelope that included a cover
23 letter. And that's the letter that I-- I had asked
24 earlier about whether there was any reason to keep that
25 ex-parte, and-- and Ms. Barnett said no. And it was

1 basically just a cover letter from Ms. Tomasic saying
2 here are the things that we've given you all, and also
3 that there are still matters on servers and how we've
4 told people to lock those down and don't look at them.
5 So that's what happened at about 5:30, no later than
6 5:35 on August 25th. Ms. Tomasic with Chris Johnson,
7 the deputy marshal, gave that to Ms. Schlacter.

8 I should also say that Ms. Schlacter stated
9 that, you know, when she heard the voice and she went
10 out in the office and she was surprised to see Ms.
11 Tomasic, that Ms. Tomasic also expressed surprise and,
12 in fact, said, "Oh, I didn't think anyone would be here,
13 so I had a marshal break me in." Those were her exact
14 words.

15 So anyway, this caused my law clerk some
16 consternation. As an aside, I will just tell you, I
17 mean, this, of course, could've been totally innocent on
18 Ms. Tomasic's part, but the way our chambers are
19 configured, they're secured. And I, frankly, really
20 thought about whether I should even bring this up,
21 because I'm not-- I don't have enough information to say
22 that there was anything wrong going on or anything like
23 that. But it caused me great discomfort, it caused my
24 law clerks great discomfort.

25 If Melody Brannon and her staff had done

1 this and had a U.S. Marshal bring them in to deliver a
2 package after hours unannounced without my knowledge,
3 without my consent, I'd be sitting here right now
4 telling the U.S. Attorney's Office and all of you. And
5 I guarantee you, the prosecutors wouldn't like that.
6 They'd be concerned, just like I'm sure you're
7 concerned. So that's why I'm bringing it to your
8 attention.

9 I don't want to make more of it than should
10 be made, but I felt like it's not something I'm going to
11 hold on to in terms of information because it did cause
12 us great concern. The impounded materials presumably
13 were in my office. That's evidence. I don't normally
14 have that kind of stuff in my office. I mean, that
15 resides with the U.S. Attorney's Office or the
16 investigative agencies. I'm not particularly
17 comfortable with the fact that I have ordered all of
18 this impounded and it's now under my custody and
19 control.

20 Ms. Tomasic and no one else knew this, but
21 fortunately, my law clerks have been trained well and
22 when Ms. Tomasic brought all that stuff up at 3:00, they
23 immediately secured it in a locked vault in the clerk's
24 office, where it has remained since, where it will
25 continue to remain. And when I appoint this master or

1 expert, we're going to ensure that as that person
2 reviews these things or whoever reviews them, we're
3 going to make sure that they're secure. You have my
4 assurance about that.

5 But anyway, it gave us all consternation
6 that someone, a litigant in a case, a lawyer in a case,
7 and frankly that a Deputy U.S. Marshal, who has access
8 to our chambers but only for security purposes, would
9 come in after hours. Like you prosecutors, like you
10 defense counsel, like you working people in this
11 courtroom, if you come into my office, my private
12 secured chamber space without my knowledge or consent,
13 I'm not hiding anything except I have work product, I
14 have work in progress, I don't want any of you to see
15 it. I don't want anyone to see it. Just like you don't
16 want the other side or even me to see your work in
17 progress and your work product and other things.

18 I had in camera submissions in this case
19 that-- for example, Ms. Rokusek I think at that point
20 had given me something. The government today has given
21 me a number of in camera things. I mean, these are the
22 things that when we lock our door at night, we have to
23 have some assurance that nobody is going to come in
24 there and-- and be in that space. Even if they're not
25 going to view it, we-- we just don't want anybody in our

1 space. So it did cause consternation.

2 I keep in camera things locked up. The
3 things submitted to me today by the government are going
4 to be locked up. In fact, everything in this case is
5 going to be kept in that vault, I assure you. But
6 anyway, it caused us some consternation, so much so that
7 my law clerks-- I was out of town on vacation. My law
8 clerks were concerned, they called our Clerk of Court,
9 our Clerk of Court had communication with United States
10 Marshal Ron Miller that night and United States Attorney
11 Tom Beall. And they discussed the incident.

12 At that point what Mr. O'Brien, my Clerk of
13 Court, was told through an e-mail from Ms. Barnett--
14 well, no, Ms. Barnett called Mr. O'Brien, and Ms.
15 Barnett reportedly told Mr. O'Brien that she and Ms.
16 Metzger were involved in how things proceeded, it wasn't
17 just a unilateral decision from Ms. Tomasic as to how to
18 deliver this package, and-- and apologized.

19 Later the next day, Ms. Barnett sent an
20 e-mail apologizing for the intrusion into your office
21 last night and requesting that I meet with her boss,
22 U.S. Attorney Mr. Tom Beall, which I did. I came back
23 from vacation early. The following Monday, on
24 August 29th, I met with U.S. Attorney Tom Beall. I met
25 with U.S. Marshal Ron Miller. They had already talked

1 amongst themselves, but Mr. Beall-- and I should say
2 that both Mr. Beall and Mr. Miller apologized profusely
3 and assured me that it would not happen again. No one
4 on either one of their staffs would enter my chambers or
5 any other chambers unannounced, without knowledge,
6 without consent, because obviously that's not the proper
7 protocol or procedure. And they both assured me, and
8 I-- I trust their assurances that it won't happen again.

9 Mr. Beall in that conversation with me
10 explained that the reason this happened was that Ms.
11 Tomasic felt that she needed to comply with the Court's
12 order to impound, and that she thought the deadline for
13 full compliance was that day, August 25th. Actually,
14 the deadline wasn't that day. I had given the
15 government seven business days, that might've been the
16 seventh calendar day. But in any event, she thought she
17 needed to comply. That she had had a conference with
18 Kim Flannigan and Debra Barnett and Emily Metzger about
19 how to comply and how to submit these additional
20 materials.

21 And that in the course of that conversation,
22 someone, who they didn't identify, someone decided that
23 they should get a U.S. Marshal to let her into the
24 Court's secured space so that she could deliver the
25 package under the door. And that she didn't have an

1 intent to actually enter my chambers office, that her
2 intent was to slip the package under the door back in
3 the secured space, given access with-- by the U.S.
4 Marshal.

5 So that's what Mr. Beall and I discussed.
6 And I-- again, I just bring this to your attention. I
7 don't think I have to harp on this. You all know-- I'm
8 sure you can understand why this made me uncomfortable.
9 Why it would make any of you uncomfortable if it
10 happened to you from someone else.

11 I-- I'm uncomfortable with the explanation
12 as well. I'm not saying it's not true, but it just
13 gives me great discomfort that Ms. Tomasic appeared in
14 my office at 5:30 or 5:35 on that Thursday. She made no
15 attempt whatsoever to contact us like she had at 3:00 to
16 say, "Hey, I've got more things, let me bring it up to
17 you." We would've, you know, accomplished that. There
18 was somebody there. She had no reason not to think
19 somebody was there. But more importantly, she didn't
20 check to see if anyone was there.

21 Yet from the explanation given and what I
22 can reconstruct, before 5:30 when she shows up with the
23 marshal, she had time to send an e-mail at 5:09 to-- and
24 it's attached to the ex-parte letter that was given to
25 me, an e-mail to investigative agents telling them, you

1 know, don't look at certain things because of the
2 judge's order. She did that at 5:09. She had time to
3 get other attorneys on the phone and have a phone
4 conference where they apparently-- somebody decided the
5 way to handle this was not to call my chambers or
6 e-mail, but to find a marshal to-- to let them in. And
7 she had to get the marshal to bring her upstairs.

8 So, I mean, it just-- it boggles my mind
9 that all of this happened, but no one says, "Hey, why
10 don't we check with Judge Robinson and follow the
11 protocol and-- and see if we can bring it up." Because
12 if the idea was to meet some deadline, it doesn't make
13 sense to me that this is the way you do it.

14 First of all, my door to my office doesn't
15 have a time stamp on the bottom. So if you slip
16 something under the door, you're not going to be able to
17 prove you gave it to me on August 25th versus the next
18 morning, I mean, if nobody is there. So that doesn't
19 make sense. The package itself is thick enough that I
20 would have been surprised that somebody would've assumed
21 it would slip under an office door. It was probably
22 about an inch thick and then there was an envelope
23 attached on top of it.

24 It just doesn't make sense to me. I find it
25 puzzling. It does not at all factor into the scope of

1 what I'm going to have the master do. I'm not telling
2 you that for that reason. But I will say the master or
3 the expert is going to be considering violations and is
4 going to be following the trail as it may be. And who
5 knows, I mean, I don't know if that person will find
6 something that will shed light on this or not. Or maybe
7 that person will find something that-- you know, this
8 was just a bad error of judgment, that's all it was, and
9 it was totally innocent. That's fine too.

10 I just wanted to make this record because it
11 troubled me. At the same time I wanted to assure all of
12 you that I'm doing everything I can to keep these
13 materials secure, to keep the in camera submissions from
14 the government secure, to keep the in camera submissions
15 from the defense secure. They're in a vault. I can't
16 even open the vault, only someone in the clerk's office.
17 I won't reveal who that person is. So we're doing
18 everything we can, and we will continue to.

19 And that's all I wanted to do, was make a
20 record of that, bring it to your attention, tell you
21 that I-- I can-- have not and will not draw any
22 conclusions about what that was all about. Hopefully it
23 was just totally a bad error in judgment and an innocent
24 bad error in judgment, but I wanted to make that record
25 before we closed the record today.

1 All right. This matter is considered
2 submitted, it's under advisement. And I'll be issuing a
3 written decision appointing-- it will likely be a
4 neutral expert rather than a master, given the
5 government's lack of consent to anything other than what
6 they want.

7 All right. So we'll be in recess.
8 (5:17 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 164 pages, is a full, true, and correct reproduction of my shorthand notes as reflected by this transcript.

SIGNED September 9, 2016.

/s/ Kelli Stewart

Kelli Stewart, CSR, RPR, CCR, RMR