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Federal judge chides prosecutors in Leavenworth CCA recording controversy: 'You all need to get your act together'

Public defender says attorney-client phone calls were recorded despite assurances to contrary

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The federal public defender in Kansas says the Leavenworth Detention Center records attorney-client phone calls, even when attorney phone numbers have been registered with the facility.

KANSAS CITY, Kan. — The federal public defender in Kansas says the Leavenworth Detention Center recorded attorney-client phone calls, even when an attorney's phone number was registered with the facility.

A federal judge on Wednesday also harshly criticized the U.S. Attorney's office for its handling of a drug and contraband trafficking case at the detention center that has led to revelations of video and audio recording of inmate interactions with attorneys. A prosecutor admitted to making a "very serious mistake" as she worked the case.

At a hearing, U.S. District Court Judge Julie Robinson reiterated her promise to appoint a special master to investigate the recordings of attorney-client phone calls, as well as video recordings of attorney-client meeting rooms. She said the special master will focus on the extent of potential Sixth Amendment violations, and if violations are found, the remedies could range from sanctions against prosecutors to the dismissal of charges, she warned.

The dispute over the recordings is playing out as prosecutors conduct a sprawling investigation of drug and contraband trafficking within the facility. A handful of people have been charged, but prosecutors indicate they believe upwards of 90 inmates may be involved as well as a number of workers.

Robinson lit into prosecutors for their handling of the case. She questioned rhetorically why prosecutors were in such a rush to file the cases. Why did individuals who were already in custody need to be indicted so quickly, she asked.

"You all need to get your act together," Robinson told the prosecutors.

Assistant U.S. Attorney Erin Tomasic admitted prosecutors should have waited and gotten their "ducks in a row." She said her desire was to stop the contraband operation at the facility. She said she had learned a great deal from what happened.

"I made a very serious mistake ... but I want the court to know I did not intend to gain that footage," Tomasic said, referring to video of attorney-client meetings.

In filings ahead of the hearing, the U.S. Public Defender in Kansas said federal prosecutors provided the Secret Service, the Kansas Bureau of Investigation and other law enforcement agencies with recordings of phone calls at the facility that included conversations between inmates and their attorneys.

The defender's office has previously said defense attorneys received recordings of calls between attorneys and individuals other than their clients. Now, the public defender's office has disclosed emails sent from the United States Attorney's office to Robinson that it says show taped phone calls were also made available to several law enforcement agencies.

Defense attorneys representing inmates at the pre-trial federal detention center, privately run by Corrections Corporation of America (CCA), say the phone recordings, along with video recordings of attorney-client meetings rooms, violate the inmates' Sixth Amendment rights.

Prosecutors argue the phone recordings are not privileged because the facility warned inmates their calls may be recorded. By continuing their calls and not taking steps to have calls with attorneys exempt from surveillance, the inmates waived their right to keep the conversations from being monitored, they argue.

Phone recordings

In a court filing Tuesday, the public defender's office says defense attorney Gary Hart submitted his phone number to CCA beginning in 2001. The filing says he was assured, in writing, that his calls would not be recorded.

On August 19, Hart subpoenaed Securus, the phone company serving CCA, for records of calls between him and his clients, public defender Melody Brannon said in the filing.

"In response to the subpoena, Mr. Hart received recordings of calls made by his clients to his office phone number — calls which he had been assured would not be recorded," Brannon wrote.

Hart represents Domingo Uriarte, who has been held at the Leavenworth Detention Center since April 29, 2015. Hart says he has sent multiple letters to the facility's warden over the years, most recently in 2014, requesting no inmate calls with him be monitored or recorded.

In response to his subpoena, Securus produced call detail reports with links to download of more than 200 recordings. The call detail reports and recordings all included calls to the federal public defender from inmates other than Uriarte.

Brannon called the revelations "rather damning evidence" of Sixth Amendment violations.

"As with the other late and seemingly endless revelations, this creates more questions and the government offers no answers," Brannon wrote.

Elsewhere, Brannon wrote that, "the government now claims the recorded attorney-client phone calls were fair game, as it unilaterally and secretly determined that CCA chameleon-like policies served as an all-encompassing waiver of the Sixth Amendment, confidentiality, privacy, and privilege."

A spokesman for CCA didn't respond to a request for comment. Prosecutors said it had served Securus with a subpoena to appear at the hearing, but no one showed.

Wayne Bigelow, the security threat group coordinator for Leavenworth CCA, testified in court. Bigelow has been responsible for the past 9 months for placing attorney phone numbers, when requested, onto a list of numbers that are not recorded. He said he could not explain why recordings of Hart's calls were made though the attorney had provided his number for exemption.

The U.S. Attorney's office, in its filing, says the detention center's handbook warns inmates it is their own responsibility to ensure their attorneys are aware of procedures for exempting their calls from recording. Prosecutors say they've attempted to minimize the potential attorney-client calls they may encounter.

Prosecutors also say inmates are warned their calls may be recorded.

"By continuing to contact their attorneys on recorded lines, these inmates had no reasonable expectation of privacy and thus waived any privilege to the content of those calls," the prosecutors argue in their filing.

The U.S. Attorney's office says reviewing recorded phone calls has helped outline the importing of drugs into the facility through fake "legal mail" and wire transfers from people outside the facility to pay for contraband inside.

"Further, the recorded CCA calls have aided agents in identifying co-conspirators both inside and outside of CCA," its filing says. "Accordingly, there is no Sixth Amendment violation, and consequently, no need for a broad investigation by a Special Master into the policies and practices of the U.S. Attorney's office."

Video recordings

Assistant United States Attorney Chris Oakley sent an email to Judge Robinson and other lawyers on August 19 listing the agencies that received copies of phone recordings, including the KBI, Secret Service and Internal Revenue Service.

A follow-up email sent Aug. 23 from Tomasic to Robinson added that the U.S. Probation Office had also received recordings to assist in pre-sentence reports and that the Johnson County Sheriff's office has reviewed recorded calls.

The emails are included as exhibits alongside a memorandum filed recently by the U.S. Public Defender's office. Brannon provided a lengthy timeline of events in the document.

The U.S. Attorney's office also filed its own outline of what happened in August. The following description of events is taken from Brannon and the prosecutors' timelines.

On Aug. 2, Tomasic calls defense attorney Jacquelyn Rokusek and says she needs to come to the U.S. Attorney's office immediately for a meeting. According to Brannon, Tomasic won't say why.

Rokusek comes to the U.S. Attorney's office later that day and is told the meeting is to convince her she needs to withdraw from a case over a conflict of interest.

"Specifically, a cooperating witness has informed the (United States Attorney's office) that Ms. Rokusek passed a protected proffer statement to a client during a meeting at (the detention center) and that Ms. Rokusek's client had shared that information with other people at (the facility)," the filing says. "They tell Ms. Rokusek that they intend to pursue an obstruction charge against her client, which would cause Ms. Rokusek to have a conflict necessitating her withdrawal."

Proffer statements are typically agreements between prosecutors and people under criminal investigation that allow them to speak with law enforcement with the understanding their statements won't be used against them during prosecution.

The U.S. Attorney's office says two individuals cooperating with the contraband investigation had alleged that the attorney for Richard Dertinger, who has been charged in a separate drug case, told Dertinger about a proffer statement made against him regarding the drug and contraband investigation. Rokusek is representing Dertinger.

According to Brannon, as the meeting wraps up Assistant U.S. Attorney Kim Flannigan tells Rokusek that a law enforcement officer is reviewing video recordings of meetings between attorneys and clients at the detention center. Flannigan says the video is being reviewed to determine whether Rokusek had given a specific document to her client.

The U.S. Attorney's office has said no one from its office or law enforcement has watched the footage.

"The most important fact for the court and the special master to consider is the simple fact that no employee of the United States Attorney's Office or law enforcement officer has viewed any recording of attorney-client meetings provided by CCA," the U.S. Attorney's office has said.

Prosecutors also say neither Tomasic or Flannigan said they intended to view or have a case agent view the attorney-client video, nor did they intend to view the video to see if Rokusek had given her client something.

"Tomasic explained that the agent was looking at video recordings from inside CCA around the time of Ms. Rokusek's visits to see Dertinger's actions and the other inmates' actions after he met with Ms. Rokusek. It was never the government's intent to view Dertinger's meetings with Ms. Rokusek," the prosecutors say in their filing.

On Aug. 3, the public defender's office tells Debra Barnett, the U.S. Attorney's office criminal chief, that it has learned that attorney-client meetings have been recorded. On Aug. 4, Barnett provides a statement from the U.S. Marshals Service that it had been told by Corrections Corporation of America that there is no recording function associated with the cameras.

Later that day, however, the United States Marshal for the Western District of Missouri says CCA does record meetings of its attorney-client meeting rooms, according to Brannon's timeline. But confusion over whether recordings have been made persists into Aug. 5.

During an Aug. 9 court hearing, the United States Attorney's Office says that, yes, it does have recordings of attorney-client meetings.

Defense attorneys clash with Leavenworth prison over recorded meetings (/news-local-state/2016-08-26/defense-attorneys-clash-leavenworth-prison-over-recorded-meetings)

Federal prosecutors say they didn't view video of attorney-client meetings at Leavenworth Detention Center (/news-state/2016-08-24/federal-prosecutors-say-they-didnt-view-video-attorney-client-meetings)

Editorial: Was attorney-client privilege violated in Leavenworth? (/opinion/2016-08-21/editorial-was-attorney-client-privilege-violated-leavenworth)

Attorneys: Federal prosecutors distributed recordings between inmates and defense counsel (/news-local-state/2016-08-16/attorneys-federal-prosecutors-distributed-recordings-between-inmates-and)

Defense seeks special master to investigate prison recordings (/news-local-state/2016-08-15/defense-seeks-special-master-investigate-prison-recordings)

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Affidavit: Elaborate smuggling ring at CCA Leavenworth left inmates like 'zombies' (/news-local-state/2016-04-11/affidavit-elaborate-smuggling-ring-cca-leavenworth-left-inmates-zombies)

Leavenworth guard again indicted in latest accusation of prison smuggling (/news-local-state/2016-06-09/leavenworth-guard-again-indicted-latest-accusation-prison-smuggling)



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