


UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA)
) No. 08 CR 888
 v.)
) Judge James B. Zagel
 ROD BLAGOJEVICH) 

**GOVERNMENT’S RESPONSE IN OPPOSITION TO
MOTION TO SUPPRESS BASED ON IMPROPER MINIMIZATION
OF PRIVILEGED AND PERTINENT CALLS**

The UNITED STATES OF AMERICA, by its attorney, Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, respectfully submits this response in opposition to “Defendant Rod Blagojevich’s Motion to Suppress Based on the Government’s Improper Minimization of Privileged and Pertinent Calls in Violation of Title III Or, in the Alternative, Request for an Evidentiary Hearing.” In the motion, defendant seeks suppression of all communications intercepted pursuant to court-authorized listening devices and wiretaps on the ground that the government under-minimized—or over-minimized—communications involving attorney William Quinlan and others. Because defendant has waived his right to seek suppression of the intercepted communications, and because his claims lack any legal or factual merit, the motion should be denied.

BACKGROUND

Wiretap Orders

The criminal charges in this case were based, in part, on evidence gathered through listening devices and wiretaps (1) at the offices of Friends of Blagojevich (“FOB”); and (2) multiple telephone lines used by defendant and members and former members of defendant’s staff in the Governor’s office and at FOB, authorized pursuant to five court orders entered on October 21, 2008, October 29, 2008, November 19, 2008, and November 26, 2008. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Minimization Instructions

At all times during which communications were being intercepted in this case, monitoring agents were under instructions, pursuant to the relevant statutes and court orders, to monitor and record only pertinent, non-privileged communications concerning violations by the named interceptees.¹ “Pertinent”

¹ Written minimization instructions were provided to monitoring agents with respect to each order authorizing the interception of communication. For
(continued...)

communications were defined as communications concerning violations of the federal mail fraud, wire fraud, extortion, and racketeering statutes, and conspiracy to commit such violations,² including communications concerning “the means by and the manner in which these persons conduct and participate in certain illegal activities,” as well as “the identities of [the named interceptees] coconspirators and coschemers, their places of operation, and the nature of the conspiracy and scheme involved.” Instr. Nos. 1, 2, 3, 4, 5.

With respect to all of the court-authorized interceptions, monitoring agents were instructed to minimize (that is, to cease monitoring and recording) any and all non-pertinent (or “innocent”) communications, and were specifically instructed to minimize *all* communications involving particular individuals once

¹(...continued)

convenience the instructions are referred to herein as follows: (1) “Instr. No. 1” - order dated October 21, 2008, authorizing interception of communications at the offices of FOB; (2) “Instr. No. 2”- order dated October 29, 2008, authorizing interception of communications on four telephone lines associated with Rod Blagojevich, Robert Blagojevich and FOB; (3) “Instr. No. 3”- order dated November 19, 2008, authorizing continued interception of communications at the offices of FOB; (4) “Instr. No. 4”- order dated November 26, 2008, authorizing interception, and continued interception, of communications on telephone lines associated with Rod Blagojevich, Robert Blagojevich, FOB, and John Harris; and (5) “Instr. No. 5”- order dated November 26, 2008, authorizing interception of communications on telephone line associated with Alonzo Monk; (collectively, “minimization instructions”). Copies of the instructions have been provided to the defense, and are being provided to the Court as well.

² The first two orders did not include authority to intercept communications concerning violations of the federal racketeering statutes.

a “pattern of innocence” had developed with respect to communications involving those individuals. *Id.* The agents were specifically admonished that they had a statutory duty to conduct interception in such a way as to “minimize the interception of communications not otherwise subject to interception,” and “to reduce to the smallest number . . . of ‘innocent’ communications” as “feasible or practical consistent with the objective of obtaining evidence of the criminal activity described in the interception order.” *Id.*

Monitoring agents were also instructed to minimize any and all communications subject to privilege, including the attorney-client privilege. *Id.*

In this regard, all of the minimization instructions stated that:

. . . The most sensitive situation commonly arising in electronic surveillance occurs when conversations overheard by the government are between a client and his attorney in which the attorney is giving legal advice. Where an attorney-client relationship exists and legal advice is sought or given, then the conversation is privileged – whether the matter being discussed concerns a criminal or civil proceeding or issue.

Id.

And the instructions provided details regarding certain privileged communications that monitoring agents might encounter:

There are two contexts in this investigation in which you may encounter attorney-client conversations. The first concerns conversations between officials of Friends of Blagojevich (FOB) and attorneys for FOB regarding the legal affairs of FOB. Such conversations are privileged if they concern legal advice provided by

the attorney to the FOB official/employee relating to a matter concerning FOB, and that advice is given at a time when only FOB official/employees and attorneys are present. In addition, conversations between State of Illinois employees and State of Illinois attorneys regarding the legal affairs of the State of Illinois are privileged if they concern legal advice provided by the attorney for the State of Illinois to the State of Illinois official relating to a matter concerning the State of Illinois, and that advice is given at a time when only State of Illinois employees and attorneys are present.

Instr. Nos. 1, 2, 3, 4.³

All of the instructions included additional requirements related to attorney-client communications concerning pending criminal or civil matters:

. . . you may encounter attorney-client conversations during the course of this electronic surveillance concerns communications between an attorney and a client concerning a pending criminal or civil matter regardless of whether the client has been formally charged or is named as a party in a particular case. If you intercept such a conversation, you must immediately terminate the conversation and make a notation in the log that the conversation was minimized and was not overheard because it was an attorney-client conversation. Do not summarize this conversation in the log. Instead, summarize it on a separate piece of paper entitled "attorney communication" and give this paper, in a sealed envelope, to the supervising agent. The supervising agent must bring this to the attention of the supervising attorney at the earliest practicable moment. None of the named interceptees in this electronic surveillance is known to be currently charged with a violation of any

³ All of the instructions other than Instr. No. 5, which authorized the interception of communications on Alonzo Monk's private cell phone, specifically identified communications regarding the legal affairs of FOB and legal matters related to the business of the State of Illinois as contexts in which attorney-client communications might occur. At the time of the interceptions, Alonzo Monk was not an employee of FOB or the State of Illinois.

criminal law.

Instr. Nos. 1, 2, 3, 4, 5.

And the instructions specifically identified certain attorneys known to represent named interceptees. Those attorney included:

- (1) Sheldon Sorosky (identified in all of the instructions as an attorney for Rod Blagojevich);
- (2) Michael Shepard and David Jones (identified in all of the instructions as attorneys for Alonzo Monk);
- (3) Ray Pijon (identified in Instr. Nos. 3, 4, and 5 as an attorney for Patricia Blagojevich);
- (4) William J. Quinlan (identified in Instr. Nos. 2, 3, 4, and 5 as General Counsel to the Office of the Governor);⁴ and

⁴ Beginning in or about May 2005 and continuing through December 31, 2008, William J. Quinlan was an attorney employed by the State of Illinois, serving as, at various times, General Counsel and Counsel to the Governor of the State of Illinois. In his capacity as General Counsel, Quinlan oversaw legal operations of state agencies within the Governor's Office, appeared in court, worked with the State of Illinois Executive Inspector General's Office, and provided business as well as legal advice to defendant and other state employees in their official, rather than personal, capacities. Quinlan reported directly to defendant, who was then Governor of the State of Illinois. While working as a state employee, Quinlan obtained permission to provide outside services to non-state employees; those services are not relevant to defendant's motion, however.

Communications involving Quinlan were deemed potentially privileged in an abundance of caution given that, although the Seventh Circuit had ruled that, in the context of a criminal investigation of a public official, the attorney-client privilege did not apply to communications between the official and government attorneys, *see In re A Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289, 293 (7th Cir. 2002), there existed contrary authority from other jurisdictions and the United States Supreme Court had not addressed the issue. During the course of the interceptions, the Chief Judge specifically approved this approach.

- (5) Tony Jacobs (identified in Instr. No. 4 as an attorney for FOB).

The instructions included the following note regarding the practical realities of identifying particular communications as subject to potential claims of privilege:

Because the attorney-client privilege is implicated only when the attorney appears to represent the other party to the conversation and legal advice is being sought or given, you have some leeway to monitor conversations involving attorneys until you can determine the fact of representation and the seeking or rendering of legal advice.

Instr. Nos 1, 2, 3, and 4.⁵

Finally, the instructions identified two circumstances in which attorney-client communications would not be privileged: (1) communications in which persons outside the attorney-client relationship were present; (2) communications concerning future illegal activities. With respect to the first circumstance, the instructions provided:

[T]he attorney-client privilege applies only to conversations intended to be confidential. The inclusion of a third person in a conversation between an attorney and a client will (subject to exceptions involving persons hired by the attorney to assist in representing the client) violate the privilege.

Instr. Nos. 1, 2, 3, 4, 5.

With respect to the second, the instructions noted that communications involving attorneys are not privileged if they are criminal in nature:

⁵ See note 3, above.

In the event that the communication between an attorney and client relates to a matter in which the client is consulting his attorney to further an illegal activity or plan some future crime, you may intercept the communication. This is because the attorney-client privilege does not apply to a conversations in furtherance of a crime or fraud.

Id.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

During the course of the interceptions, government agents pursued multiple strategies in an effort to reduce the risk that privileged conversations would be intercepted, and the minimization instructions were adjusted accordingly. Specifically, on or about November 8, 2008, the government established a filter team composed of Assistant United States Attorneys having no involvement in the investigation or prosecution of the case to review recordings of conversations that might potentially be the subject of claims of privilege. After the filter team was established, all communications involving known attorneys (including William Quinlan) were segregated for review by the filter attorneys, [REDACTED] and monitoring agents were instructed to consult with the filter attorneys, rather than the supervising attorneys, with respect to issues related to communications potentially protected by the attorney-client privilege:

[T]he agent supervising the interception must, at the earliest practicable moment, alert one of the designated attorneys and provide him/her with an accurate and complete summary of the interception. In this case, there are two designated attorneys to whom all questions or issues regarding attorney-client privilege should be directed: [REDACTED]

If you cannot reach either of them, then the supervising agent should call Reid Schar or Carrie Hamilton. After consultation between the supervising agent and the supervising attorney, a decision will be made as to whether or not the conversation is in fact privileged. If it is determined that the conversation is privileged, then the monitoring agent and supervisory agent should not disclose the contents of this conversation to any other investigator. Additionally, no leads from this conversation should be pursued. If it is determined that the conversation is not privileged, the conversation may be used for any lawful purpose along with all other intercepted conversations.

Instr. Nos. 3, 4, 5 (with immaterial variations).⁶

The filter attorneys, rather than the supervising attorneys, were solely responsible for reporting to the Chief Judge regarding the procedures for handling potentially privileged communications.⁷ Although the instructions

⁶ Prior to the establishment of a filter team, the instructions provided, with respect to communications relating to future illegal activities:

When any of these circumstances arise during monitoring, the agent supervising the interception must, at the earliest practicable moment, alert the supervising attorney and provide him with an accurate and complete summary of the interception. After consultation between the supervising agent and the supervising attorney, a decision will be made as to whether or not the conversation is in fact privileged. If it is determined that the conversation is privileged, then the monitoring agent and supervisory agent should not disclose the contents of this conversation to any other investigator. Additionally, no leads from this conversation should be pursued. If it is determined that the conversation is not privileged, the conversation may be used for any lawful purpose along with all other intercepted conversations.

Instr. 1, 2.

⁷During the course of the interceptions, the filter attorneys filed with Chief Judge special reports describing their supervision of privileged communications in connection with the wiretap. In addition, on November 14, 2008, the filter team met privately with the Chief Judge. With the permission of the Chief Judge, copies
(continued...)

Quinn, by counsel and on behalf of the Office of Governor of the State of Illinois, expressly waived, in writing, any “attorney-client privilege . . . determined to apply to the Federal Criminal Matter,” specifically, “the federal criminal investigation and prosecution of Blagojevich and his associates.”⁹

Defendant’s Waiver of Attorney-Client Privilege in Open Court

In various court filings and communications with government counsel prior to the initial trial, defendant repeatedly stated that he had no objection to the prosecution team being provided with access to all recorded conversations involving William Quinlan, but purported to reserve the right to assert the privilege with respect to disseminations beyond the prosecution team. R. 182; *see also* R. 284. On April 30, 2010, however, defendant expressly waived any remaining attorney-client privilege applicable to communications between himself and William Quinlan. 4/30/10 Tr. 11-12. Specifically, the waiver was stated as follows:

MR. NIEWOEHNER: . . . Counsel for William Quinlan is here, Jonathan King, and we thought it would be helpful to put some what we understand waivers to be on the record so that Mr. Quinlan can understand.

THE COURT: Sure.

⁹ In doing so, the Office of the Governor expressed the view that, under controlling Seventh Circuit precedent, even without a waiver, no claim of attorney-client privilege could be raised, citing *In re A Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289, 293 (7th Cir. 2002).

MR. NIEWOEHNER: From our conversations and representations made by counsel for both Mr. Rod Blagojevich and Mr. Robert Blagojevich, it's our understanding they have waived any attorney-client privilege that exists for any legal representation that did or might exist between their respective clients and Mr. Quinlan, that would include both any governmental privilege that might apply, as well as any personal privilege, as well as any privilege that might extend to the friends of Blagojevich or any private entity. It would also encompass conversations Mr. Quinlan might have had with other people who might be considered within the control group for the State of Illinois, such as, specifically, John Harris or Robert Greenlee or Lon Monk, and I think that accurately describes the waiver that they will make or have made.

THE COURT: Mr. Sorosky.

MR. SOROSKY: That's correct. That's correct.

* * *

THE COURT: Okay, I have the assurance statements made in open court by attorneys for both defendants that that is the waiver and I see Mr. King is here and has heard them.

4/30 Tr. 11-12.

In addition, defendant waived any attorney-client privilege applicable to conversations recorded pursuant to court-authorized wiretaps involving defendant, Quinlan, and Sheldon Sorosky, defendant's personal attorney:

MR. NIEWOEHNER: And I would just add one extra point, that also includes conversations either Mr. Rod or Mr. Robert Blagojevich had with Mr. Quinlan in the company of other attorneys, which might include, in fact, for example, Mr. Sorosky or other defense counsel.

MR. SOROSKY: That's correct.

4/30/2010 Tr. 12.

Waiver of Right to Seek Suppression of Court-Authorized Interceptions

Even before waiving the attorney-client privilege with respect to communications involving Quinlan, the defendant expressly waived the right to seek suppression of conversations intercepted pursuant to the court-authorized wiretaps. On February 10, 2010, in a pleading personally signed by the defendant, defendant “knowingly, intentionally, willfully, and voluntarily waive[d] any right that he possess[ed] to move to suppress [conversations intercepted pursuant to court-authorized wiretaps in October, November, and December 2008],” and sought to have all recorded conversations played in open court. R. 241, ¶ 10. This waiver expressly included the right to seek suppression on any ground stated in 18 U.S.C. § 2518(10) and Fed. R. Crim. P. 12(b)(3)(C), including but not limited to any failure to meet “the requirements of minimization, completeness, and authenticity,” as well as the right to seek suppression based on claims that the interception orders were issued without probable cause, or that “many of the recordings violate the marital privilege, the attorney-client privilege, spoliation and the executive privilege,” R. 241, ¶¶ 6, 7, 9, 10. Consistent with defendant’s waiver, no motion to suppress intercepted conversations was filed prior to the initial trial in this case.

ARGUMENT

I. All Claims Raised in Defendant's Motion to Suppress Have Been Waived.

As stated above, defendant has waived any right to move to suppress evidence obtained through the court-authorized interceptions. R. 241. The defendant's waiver specifically included a waiver of the particular grounds raised in this motion: the purported failure to meet "the requirements of minimization," as well as any purported violations of the attorney-client privilege. R. 241, ¶¶ 6,7, 9, 10. Thus, defendant's waiver precludes him from seeking suppression of the intercepted communications on any of the bases raised in the instant motion.

More specifically, defendant waived any claims based on the disclosure of purportedly privileged communications involving William Quinlan. The attorney-client privilege belongs to the client and may be waived by the client. *See United States v. Smith*, 454 F.3d 707, 713 (7th Cir. 2006). As detailed above, prior to the disclosure of communications involving Quinlan to members of the prosecution and investigation team, defendant affirmatively agreed to, and waived any right to challenge, such disclosure. R. 182, 284. Subsequently, defendant affirmatively waived *any* claims based on any applicable privilege with respect to such communications. 4/30/10 Tr. 11-12.

Contrary to defendant's argument, Mot. 10, the prosecution team did not have access to privileged communications involving Quinlan prior to defendant's waiver of privilege. Defendant supplies no evidence to support his contention that members of the prosecution and investigation team had access during the interception period, or that the government "misled this Court" when it represented otherwise. Instead, he relies upon speculation based solely on the fact that minimization instructions directed monitoring agents to contact members of the prosecution team to discuss issues relating to potentially privileged communications in the event that filter attorneys could not be reached. As a matter of fact, the filter team addressed all issues related to privilege, and withheld potentially privileged communications involving Quinlan from the prosecution team until waivers of any applicable attorney-client privilege had been received from both Governor Patrick Quinn, on behalf of the State of Illinois, and defendant.¹⁰

Accordingly, defendant has waived all arguments raised here in support of his motion to exclude evidence of intercepted communications.

II. Even if Not Waived, Defendant's Arguments Lack Merit.

As an initial matter, there is no legal basis for defendant's request for

¹⁰ In a very small number of instances, communications involving Quinlan were not segregated as a result of a misidentification by monitoring agents in the early weeks of interception. None of these communications were privileged.

suppression of all intercepted communications. Defendant argues that the government's improper interception or minimization of communications involving Quinlan and others warrants not only the suppression of improperly intercepted calls, but also the suppression of all intercepted communications. Contrary to defendant's contention, even had defendant's attorney-client privilege been violated, and even had any privilege not been waived, the suppression of derivative evidence would not required. Because the attorney-client privilege is an evidentiary privilege, not a constitutional right, *Lange v. Young*, 869 F.2d 1008, 1012 n. 2 (7th Cir. 1989), no "taint" analysis is appropriate, *see United States v. Marashi*, 913 F.2d 724, 731 n. 11 (9th Cir.1990) (stating that "no court has ever applied [the fruit of the poisonous tree doctrine] to any evidentiary privilege") (emphasis in original). Relief for improper minimization generally is to suppress any conversation or conversations that were inappropriately monitored, *see* 18 U.S.C. § 2518(10)(a)(iii); *United States v. Mansoori*, 304 F.3d 635 (7th Cir. 2002); *United States v. Charles*, 213 F.3d 10, 22 (1st Cir. 2000) (partial suppression of those conversations intercepted improperly is the usual remedy for inadequate minimization efforts; wholesale suppression of all intercepted conversations is reserved for the "particularly horrendous case").

Nor has defendant established any grounds for suppressing individual

intercepted communications, as demonstrated below.

A. Defendant is Entitled to No Relief Based on the Argument that the Government Over-Minimized Communications Involving William Quinlan and Others.

Defendant cites, and research reveals, no case in which intercepted communications have been suppressed based on the government's minimization of *too many* privileged or non-pertinent communications. In fact, not only does the relevant statute contain no requirement that the government intercept innocent communications, it expressly provides just the opposite, limiting interception to pertinent communications, *i.e.*, communications related to illegal activity as specified in the court's order, to the fullest extent possible. 18 U.S.C. § 2518. Moreover, the statute specifically requires that every order authorizing electronic interception of oral communications contain a provision requiring that the interception "be conducted in such a way as to *minimize* the interception of communications not otherwise subject to interception." 18 U.S.C. § 2518(5). Thus, when conducting court-authorized interceptions of oral communications, the government is obligated to attempt to reduce to the smallest number possible "innocent" communications that are intercepted, consistent with the objective of obtaining evidence of the criminal activity described in the interception order. *See United States v. Dumes*, 313 F.3d 372, 380 (7th Cir. 2002).

Given that the statute requires the government to attempt to avoid

intercepting innocent and privileged communications, a failure by the government to intercept “innocent” communications cannot possibly provide a basis for suppression. Therefore, even if defendant had not waived the right to seek suppression of intercepted communications and the right to assert the attorney-client privilege with respect to such communications, defendant’s complaint that particular calls were, but should not have been, minimized provides no basis for relief.

Moreover, even if the law provided a remedy for “over-minimization,” defendant has failed to establish that the government’s minimization of communications involving Quinlan was in any way improper. First, defendant’s assertion that the government minimized portions of communications under the “guise” of privilege when their real interest was to minimize portions “that were likely to be damaging to its case,” Mot. 3-4, is wholly unsupported by the evidence. As reflected in the Special Reports submitted by the filter team, and the transcript of the filter team’s November 14, 2008 meeting with the Chief Judge, the government took a conservative view of the applicability of privilege in light of the potentially unsettled nature of the law in this area, and this approach was expressly sanctioned by the court.

As demonstrated below, in the case of each particular communication defendant cites, the monitoring agents’ decision to minimize was reasonable,

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[REDACTED]

[REDACTED]

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that the full scope of defendant's scheme was not clear at the time of this call.

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

11/04/08, 10:43 a.m. (Blagojevich's Home Telephone - 193)

In this call defendant discussed with Harris his concerns regarding the Tribune's editorials seeking his impeachment. Defendant argues that this minimization was improper because the call was pertinent. As in the case of the earlier communications, however, it is apparent that during this early period, the full scope of defendant's criminal scheme was not fully known by the monitoring agents. Once again, defendant makes no effort to explain how he was prejudiced, or to provide any basis for believing that the minimized portions of the conversation would have benefitted him.

11/04/08, 12:19 p.m. (Blagojevich's Home Telephone - 218)

Defendant challenges the minimization of this call in which he and Greenlee discussed the Senate seat appointment. As was the case of defendant's other charges of "over-minimization," there is no reason to believe that the minimized portions would have been beneficial to the defendant, rather than to the government, and no reason to question the reasonableness of the agent's decision to minimize.

11/05/08, 11:06 a.m. (Blagojevich's Home Telephone - 281)

In this call, defendant discussed the election, politics, SEIU and the Senate seat appointment with Doug Scofield. The call was minimized and spot checked, obviously because at this early stage the government was unaware of the full scope of defendant's scheme. Once again, defendant has provided no reason to believe that he was prejudiced by the minimization of this call.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

minimization” would have provided no basis for relief.

B. Nor Has Defendant Established a Pattern of Improper Failure to Minimize.

It is clear that 18 U.S.C. §2518 does not forbid interception of non-pertinent conversations or conversations protected by privilege but, rather, requires “a reasonable effort to minimize such interceptions.” *United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995). “A court assessing the sufficiency of the government’s [minimization] efforts . . . must ultimately decide whether the steps that agents have taken to minimize the interception of communications unrelated to the investigation were objectively reasonable given the circumstances confronting the agents.” *United States v. Mansoori*, 304 F.3d 635, 647 (7th Cir. 2002) (citing *Scott v. United States*, 436 U.S. 128, 137 (1978)).

“Although the adequacy of the government’s minimization efforts necessarily depends on the facts of each case, relevant considerations include the kind and scope of criminal enterprise that the government was investigating, the thoroughness of the government’s efforts to ensure that nonpertinent calls will be minimized, the extent to which the government could have foreseen that certain types of conversations would be innocuous and thus subject to minimization, use of code, and the extent to which the authorizing judge oversaw the interception efforts.” *Mansoori*, 304 F.3d at 647. The Court’s inquiry focuses

on the “reasonableness” of minimization efforts, in light of the totality of all the circumstances. *E.g., United States v. Hull*, 456 F.3d 133, 142-43 (3d Cir. 2006) (citing *Scott*).

A single failure to minimize a call that should have been minimized is not “indicative of any systemic failure to minimize.” *United States v. Fisher*, 2009 WL 750246 (E.D. Wis. 2009). Only where the defendant establishes a pattern of interception of innocent conversations developed over the course of the wiretap is exclusion of particular calls warranted. *United States v. Dorfman*, 542 F.Supp. 345, 391 (N.D. Ill. 1982).

To the limited extent that defendant alleges that the government failed to minimize privileged communications, defendant has not come close to establishing any pattern of improper minimization. In fact, defendant has not shown that the government failed to minimize *any* privileged communications. Contrary to defendant’s suggestion, it was not necessary to minimize all calls involving Quinlan based on his role as Counsel to the Governor. Only communications determined to be privileged—that is, communications involving actual legal advice, solicited or provided in confidence, and not involving ongoing or future criminal activity—were appropriately minimized, and monitoring agents were properly so instructed.

Next, discrete errors in identifying participants or parts of the scheme,

particularly errors made early in the interception period, provide no basis for deeming the monitoring agents' minimization decisions unreasonable. The reality of monitoring is that it takes a while to recognize the voices of participants, and to fully understand the scope of the scheme under investigation. In the early stages, it is quite natural for agents to fail to recognize the significance of topics that later prove to be highly pertinent and probative. As the Seventh Circuit has commented, it is "all well and good to say, after the fact, that certain conversations were irrelevant and [monitoring] should have been terminated. However, the monitoring agents are not gifted with prescience and cannot be expected to know in advance what direction the conversation will take." *Mansoori*, 304 F.3d at 647 (citation omitted). Thus, the Seventh Circuit has made clear that "[i]n evaluating whether the government had properly minimized interceptions, the courts should proceed in a realistic, commonsense fashion" *Dumes*, 313 F.3d at 380. This means that the Court must consider the fact that it is never possible to tell whether a conversation is pertinent and not privileged without listening to a portion of the communication, and monitoring agents are better able to make such determinations after a period of interceptions allows them to identify voices, and to comprehend the nature of the communication in relation to past interceptions.

None of the conversations defendant claims should have been, but were

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[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

¹ [REDACTED]

[REDACTED]

[REDACTED]

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In sum, defendant has failed to establish any pattern of failing to minimize privileged or non-pertinent communications, much less any pattern of disclosure of privileged communications to the investigation and prosecution team prior to their receipt of a full and complete waiver of privilege with respect to intercepted communications.

Thus, for all of the foregoing reasons, neither defendant's claims of purported under-minimization, nor his claims of purported over-minimization, provide any basis for suppression— even were it the case that defendant had not previously waived his right to seek such relief.

CONCLUSION

For all of the foregoing reasons, the government respectfully requests that the defendant's motion be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that the following document:

**GOVERNMENT'S RESPONSE IN OPPOSITION TO
MOTION TO SUPPRESS BASED ON IMPROPER MINIMIZATION
OF PRIVILEGED AND PERTINENT CALLS**

was served on March 22, 2010, in accordance with FED. R. CRIM. P. 49, FED. R. CIV. P. 5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as to ECF filers.

Respectfully submitted,
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