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March 13, 2017

The Honorable Brian M. Cogan
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Joaquin Archivaldo Guzman Loera, 09 CR 466 (BMC)

Your Honor:

We write to request an immediate modification of the Special Administrative Measures ("SAMs") to allow: 1) Mr. Guzman to speak with his wife, Emma Coronel Aispuro, either in person or by telephone, for the limited purposes of communicating his choice of private counsel and determining the availability of assets necessary to retain such counsel; and 2) private attorneys to relay messages between Mr. Guzman and third parties for the limited purposes of ascertaining and securing the assets necessary for their representation. Attached to this letter, as Exhibit A, is a copy of the SAMs.

We further challenge the imposition of the SAMs in their entirety because they violate Mr. Guzman's Sixth Amendment rights to effective assistance of counsel, to develop a defense, and to conduct a meaningful investigation. The SAMs also contravene Mr. Guzman's Fifth Amendment right to due process and his First Amendment rights to free speech and free exercise of religion.

For the reasons detailed below, the defense moves to vacate the SAMs in full, to release Mr. Guzman from solitary confinement, and to place him in the general prison population. If the Court were to deny that motion, the defense moves, in the alternative, to vacate or modify various sections and provisions of the SAMs.[1] If the Court is not inclined to grant the relief herein requested, the defendant further requests that an evidentiary hearing be held pursuant to *Turner v. Safley*, 482 U.S. 78 (1987).

[1] The defense also frames its request for relief in the alternative as a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241.

I. Background

A. Mr. Guzman's extradition and detention

On January 19, 2017, in the final hours of the Obama presidency, without notice to his attorneys in Mexico, Joaquin Guzman was airlifted from Mexico to the United States to face charges in the Eastern District of New York. It is undisputed that prior to January 19, 2017, the United States had not sought Mr. Guzman's extradition to the Eastern District of New York. The government of Mexico granted Mr. Guzman's extradition for charges pending in the Western District of Texas and the Southern District of California. Mr. Guzman's counsel in Mexico believed that his appeal of the extradition order was still pending when he was removed from the country.

Upon arrival at MacArthur Airport in Long Island, Mr. Guzman's flight was met by members of the press, who were permitted to photograph Mr. Guzman both as he was escorted off of the plane in handcuffs while flanked by law enforcement officers and inside a hangar at the airport.[2] This orchestrated event served no legitimate law enforcement function and ran afoul of the Code of Federal Regulations (and also belies the government's proclaimed security concerns.) *See*, 28 C.F.R. § 50.2(vi)(7).[3]

On January 20, 2017, before Mr. Guzman's arraignment on the Superseding Indictment, the government filed a 56-page detention memorandum. At the time of the filing, the government was aware that the chance that Mr. Guzman would apply for release on that day was non-existent and that they would be given ample time to make their position on bail known should the need arise. Despite the government's protestations to the contrary, there is little doubt that the detention memorandum was intended primarily as a press release which could only serve to prejudice Mr. Guzman and taint the pool of potential jurors.

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[2] *See, e.g., "El Chapo" To Appear In Court* (CBS New York television broadcast, Jan. 20, 2017) *available at* https://www.youtube.com/watch?v=qm4DsVOH72U (television news report posted on youtube.com, garnering over 300,000 views, displaying video of Mr. Guzman after his arrival at MacArthur Airport, and demonstrating that law enforcement assisted the media in photographing Mr. Guzman while he was transported in custody); *"El Chapo" arrives at Long Island MacArthur Airport* (Newsday website broadcast, Jan. 20, 2017) *available at* http://www.newsday.com/long-island/el-chapo-arrives-at-long-island-macarthur-airport-1.12986526 (also depicting press access to Mr. Guzman and law enforcement personnel after his arrival in this District). The US Attorney's office for the EDNY also "retweeted" a picture showing Mr. Guzman in the custody of the DEA without obscuring the face of the law enforcement agent.

[3] "Personnel of the Department of Justice should take no action to encourage or assist news media in photographing or televising a defendant or accused person being held or transported in Federal custody. Departmental representatives should not make available photographs of a defendant unless a law enforcement function is served thereby." 28 C.F.R. § 50.2(vi)(7);

Further, immediately following Mr. Guzman's arraignment, Robert Capers, the then-United Stated States Attorney for the Eastern District of New York, hosted a forty-nine minute press conference in which he and other law enforcement personnel went far beyond merely commenting on the charges in the Indictment.[4] This press conference was also in clear contravention of the Code of Federal Regulations. *See* 28 C.F.R. § 50.2(b)(2)(i), (iv), and (vi).[5] During the event, Mr. Capers likened Mr. Guzman to a "cancerous tumor" and commented that "the caliber of witnesses are strong and great; *"El Chapo", Joaquin Guzman Loera, Faces Charges in Brooklyn New York*, (United States Attorney's Office for the EDNY video production, Jan. 20, 2017).[6] The press conference video was not only posted on the website for the United States Attorney's Office for the Eastern District of New York, but appears to have been posted on Twitter and on YouTube by that Office, where it has been viewed more than two thousand times. An excerpted clip in which Mr. Capers compares Mr. Guzman to a cancerous tumor has been viewed close to 5,000 times. Video of the press conference remains widely available to the public on YouTube and various other media outlets. While sparing no detail in recounting the legend and myth of the notorious alleged narcotics trafficker "El Chapo" in their "detention memorandum" and extensive press conference, the government, of course, neglected to note the Joaquin Guzman has never been convicted of a narcotics trafficking offense or a violent crime.[7]

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[4] Pursuant to the Code of Federal Regulations, government prosecutors are prohibited from making statements to the media which "may reasonably be expected to influence the outcome of a pending or future trial." See, 28 C.F.R. § 50.2(b)(2). The CFR recognizes that certain types of information "create dangers of prejudice without serving a significant law enforcement function. Therefore, personnel of the Department should refrain from making available the following:
(i) Observations about a defendant's character.
(ii) Statements, admissions, confessions, or alibis attributable to a defendant, or the refusal or failure of the accused to make a statement.
(iii) Reference to investigative procedures such as fingerprints, polygraph examinations, ballistic tests, or laboratory tests, or to the refusal by the defendant to submit to such tests or examinations.
(iv) Statements concerning the identity, testimony, or credibility of prospective witnesses.
(v) Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial.
(vi) Any opinion as to the accused's guilt, or the possibility of a plea of guilty to the offense charged, or the possibility of a plea to a lesser offense." *See* 28 C.F.R. § 50.2(6);

[5] "The rules that govern public statements by federal prosecutors regarding accused defendants are designed ... with a heavy thumb on the side of defendants' fair trial rights." *United States v. Silver*, 103 F. Supp. 3d 370, 373 (S.D.N.Y. 2015). The court further noted that "the U.S. Attorney, while castigating politicians in Albany for playing fast and loose with the ethical rules that govern their conduct, strayed so close to the edge of the rules governing his own conduct that [defendant had] a non-frivolous argument that he fell over the edge to the Defendant's prejudice." *Id.*

[6] *available at* https://www.youtube.com/watch?v=4OcN5ZbGne8

[7] In its Detention Memorandum, the government, without qualification, attributed the notorious 1993 killing of Cardinal Juan Jesus Posadas Ocampo, to cartel infighting between Mr. Guzman's alleged cartel and the Arellano Felix Drug Trafficking Organization. However, in the years since the Cardinal's death, the Church itself disputed this version of events, accusing the government of

The government's conduct compounded a glaring threat to Mr. Guzman receiving a fair trial– the pervasive and overwhelming negative media portrayals of Mr. Guzman which have persisted for years and continue. For example: Telemundo is currently airing a fictionalized account of Mr. Guzman's life, called "El Cheme;" Netflix and Univision have jointly announced an "El Chapo" series to premiere in April; the History Channel is also developing a television series purporting to explore the drug wars through the "true story" of Joaquin Guzman; and another movie directed by Ridley Scott is set to be filmed this summer. Additionally, former DEA agents, claiming to have worked on the investigation at some point, continue to give interviews and have published books about Mr. Guzman.[8] More books are set to be published to capitalize on the arrest of Mr. Guzman. Yet, pursuant to the SAMs, Mr. Guzman is prohibited from communicating with the news media, and has no ability to contradict negative and false media reports. (SAMs § 4)

On January 27, 2017, the government asserted, via letter brief, that Mr. Guzman was a billionaire who should retain his own counsel. The government acknowledged that it was aware that Mr. Guzman was "making inquiries of private counsel." (Dkt. No. 23 at 3.) The government requested that the Court conduct a "strenuous inquiry" into Mr. Guzman's eligibility for appointed counsel. (Dkt. No. 23 at 6.) Defense counsel addressed the issue at the February 3, 2017 status conference ("Feb. 3 Conf."), noting that Mr. Guzman had no access to funds himself, had not had an opportunity prior to arrival in this District to make arrangements for counsel– as neither he nor his Mexican counsel had been given notice of his extradition or that he would be facings charges in the Eastern District of New York– nor had he had the ability to communicate with his family or Mexican counsel since he arrived in the United States.[9] (Feb. 3 Conf. Tr. at 10-13.)

Prior to the February 3 court appearance, defense counsel had notified the government that it would seek to have a lawyer from Mr. Guzman's legal team in Mexico, Silvia Delgado, accompany defense counsel to the courthouse pens to visit with him. On February 2, 2017, the government filed an *ex parte* letter regarding this requested visit. (Dkt. No. 31.) The government prevented Ms. Delgado from meeting with her client on February 3 in the pens.

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participating in the assassination of the Cardinal. *See An End To Impunity: Investigating The 1993 Killing Of Mexican Archbishop Juan Jesus Posados Ocampo*, *Hearing Before the House Subcomm. on Africa, Global Human Rights and International Operations of the Committee on International Relations* ; 109th Cong., 109-168 (April 6, 2006).

[8] *Special agent who helped capture El Chapo gets book deal*, N.Y. Post, Feb. 1, 2017 *available at* http://nypost.com/2017/02/01/special-agent-who-helped-capture-el-chapo-gets-book-deal/

[9] At the February 3 conference, the government, for the first time, acknowledged in open court that the United States government submitted a request to the Mexican government asking Mexico to waive the Rule of Specialty which would otherwise bar Mr. Guzman's prosecution in this District. The defendant does not concede that the government of Mexico's alleged waiver of the Rule of Specialty is sufficient to render Mr. Guzman's prosecution in the Eastern District of New York lawful. The defendant intends to file a motion arguing that his prosecution in the Eastern District of New York violates the Rule of Specialty found in the Extradition Treaty between the United States and Mexico.

Ms. Coronel and Ms. Delgado traveled to New York to attend the status conference on February 3. Defense counsel had previously sought approval for Ms. Coronel to visit him at the jail or speak with him by telephone. At the February 3 conference, the government maintained that permission for Emma Coronel, was "going through its normal process." (Feb. 3 Conf. Tr. at 26-27.) The government further indicated that its *ex parte* submission regarding visitation pertained to Ms. Delgado and not Ms. Coronel. (*Id.* at 27.)

Since his arrival in this district, Mr. Guzman has had no contact with his wife, family, or Mexican legal team. Late in the afternoon on February 3, 2017, as defense counsel was preparing to leave Brooklyn to visit Mr. Guzman at the Metropolitan Correctional Center ("MCC") in Manhattan, we were informed that SAMs had been authorized and that no further communication with Mr. Guzman would be permitted until defense counsel and other staff signed the SAMs. After the imposition of the SAMs, defense counsel continued to assist Ms. Coronel with the visitation process.[10] Ms. Coronel's paperwork was submitted to the MCC on Monday February 6, 2017. On February 15, 2017, defense counsel provided the government with documentation of the marriage of Ms. Coronel and Mr. Guzman. On February 24, 2017, defense counsel received an email from AUSA Andrea Goldbarg stating that, "[a]fter additional vetting conducted by the agents per the SAMs, and for the reasons set forth in the government's *ex parte* submission to the Court on February 2, 2017, the government will not be authorizing Emma Coronel to have visitation with the defendant, either in person or by telephone." Based on this email and the scope of the investigation into Mr. Guzman and Ms. Coronel prior to his extradition, it is apparent that the government never intended to allow Ms. Coronel permission to visit or communicate with her husband in any manner. Defense counsel was provided with no specific reasoning for the government's decision.

The SAMs themselves contained no specific allegation against Ms. Coronel, but instead contained vague references to the alleged assistance by "family members" to pass messages "in and out of prison to individuals associated with the Sinaloa Cartel" and that "family members were allegedly integrally involved in engineering Guzman's elaborate escape plan." (SAMs at 2.) As the defense has been denied access to the content of the government's *ex parte* filings or the results of the "additional vetting," neither defense counsel nor Ms. Coronel has the ability to fairly challenge the government's determination. Hence, Mr. Guzman has effectively been cut off from all communication with his wife, and left with no ability to controvert the government's allegations.

The stated justification for limiting family communication in the SAMs is "to prevent [Mr. Guzman] from committing, soliciting, or conspiring to commit additional criminal activity." According to the SAMs, the conditions imposed are the "*least restrictive* that can be tolerated in light of the . . . substantial risk that [Mr. Guzman's] communications or contacts with persons could result in death or serious bodily injury to persons." (SAMs at 16-17)(emphasis added). However, pursuant to the SAMs, even if Mr. Guzman were given permission to have visits or telephone calls with Ms. Coronel to discuss the financial arrangements necessary to retain private counsel, those

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[10] A private attorney was given clearance by the government to visit Mr. Guzman shortly after his arrival in this district, without notification to defense counsel. Originally this attorney indicated he would assist Ms. Coronel to visit her husband. It now appears that, after having Mr. Guzman execute the necessary paperwork to enter the MCC, private counsel did not take the necessary steps to submit this paperwork to the jail prior to the imposition of the SAMs.

contacts would necessarily be subject to contemporaneous monitoring and translation and could be terminated at any time if the government determined there was a danger. (SAMs §§ 3(a) to (f)). In light of these conditions, there is no danger that the requested immediate modification to the SAMs to allow Ms. Coronel to visit with her husband in person and by telephone to discuss the financial arrangements necessary to retain an attorney will facilitate criminal activity or pose a security risk.

Since his arrival in New York, Mr. Guzman has not been permitted to make a single telephone call, even to his attorneys. Even prior to the imposition of the SAMs, staff at the MCC would not permit Mr. Guzman to contact his attorneys without imposing a restriction that only counsel of record and additional members of the staff who had been cleared to visit Mr. Guzman could be present in the office during the call. This restriction is unheard of in a case prior to the imposition of SAMs. It should also be noted that while the SAMs allow for counsel calls, the MCC has not facilitated such calls, denying requests by Mr. Guzman, and failing to follow through with defense counsels' requests for counsel calls.

Mr. Guzman's only visitors have been his Federal Defenders defense team and select private attorneys cleared by the Assistant United States Attorneys involved in the prosecution of Mr. Guzman.[11] Further, since the imposition of the SAMs, Mr. Guzman has not been permitted even indirect contact with his family, as neither his defense team nor private attorneys who have been cleared to see him, are permitted to disseminate communications from Mr. Guzman to third parties. (SAMs § 2(d)). This not only frustrates Mr. Guzman's ability to maintain a relationship with his wife and their two young daughters, but prevents him from assisting his family at a time of reported widespread violence in Sinaloa, Mexico.

Further, and perhaps of most immediate importance, the total blackout of communication between Mr. Guzman and his wife, has completely defeated Mr. Guzman's Sixth Amendment right to retain counsel of his choice. Since his incarceration, Mr. Guzman has made good-faith efforts to meet with and select private counsel. While Mr. Guzman has continued to make efforts to retain private counsel, and believes he may be close to reaching a decision as to which attorney he seeks to retain, he has no ability to access funds himself. His complete inability to communicate with his wife, either directly or through third parties, has made it impossible to ascertain whether there is a family member or friend who has the necessary funds to retain a private attorney and the logistics of securing such funds.

Mr. Guzman is currently confined at Unit 10 South of the Special Housing Unit of the MCC. Amnesty International has previously condemned conditions in the unit "as amounting to cruel, inhuman or degrading treatment and incompatible with the presumption of innocence in the case of untried prisoners whose detention should not be a form of punishment." Amnesty International, *Cruel conditions for pre-trial prisoners in US federal custody*, Apr. 12, 2011) *available at* https://www.amnesty.org/en/documents/amr51/030/2011/en/ (also finding that "[t]he

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[11] The MCC recently began providing religious visits after defense counsel alerted the legal department that Mr. Guzman had requested such visits. Mr. Guzman has now had two visits from the authorized religious representative. The first was terminated after a few minutes because the religious representative did not speak Spanish and could not communicate with Mr. Guzman. The second occasion was this past Sunday, when a BOP guard was used as a translator.

conditions may also impair a defendant's right to assist in his or her defence and thus the right to a fair trial.")

In 10 South, pursuant to the SAMs, Mr. Guzman is confined to a small, windowless cell. He remains in this cell alone for 23 hours a day Mondays through Fridays, when he is permitted a single hour of solitary exercise in another cell that contains one treadmill and one stationary bicycle. On the weekends, he is confined 24 hours a day and not permitted any exercise. His meals are passed through a slot in the door; he eats alone. The light is always on. With erratic air-conditioning, he has often lacked enough warm clothing to avoid shivering. Repeated requests by counsel to have the MCC adjust the temperature have landed on deaf ears. He never goes outside. His only opportunity to see daylight is when he passes a small window on the way to his counsel visit or the exercise cell. Although he purchased a small clock from the commissary, it was later removed from his cell without explanation. Without a window or access to natural light, the clock was the only way for Mr. Guzman to distinguish day from night.

Except for visits from legal counsel, Mr. Guzman is completely isolated. He is prohibited from sharing a cell or communicating in any way with other inmates. (SAMs § 6(a) and (b)). Mr. Guzman is a native Spanish speaker; he does not speak English. His housing unit appears to be staffed almost exclusively with guards unable to communicate in Spanish. Besides an occasional incidental interaction with a Spanish-speaking correctional officer, Mr. Guzman must communicate with guards through gestures. While Mr. Guzman was able to purchase a small radio from the MCC commissary, his legal visits are essentially his only contact with the outside world. Mr. Guzman's access to any reading material is severely limited by the SAMs. (SAMs §§ 8 and 9). Further, while Mr. Guzman is authorized under the SAMs to watch television, there is no television in his cell and none available for purchase in the commissary. (SAMs § 8(b)). The only available television is in the exercise room where Mr. Guzman spends a total of 5 hours a week, but he has never been permitted to watch it. When questioned about this, counsel for the MCC informed defense counsel that they were attempting to find suitable programing such as videos from the National Geographic Channel before allowing Mr. Guzman to watch television.

While Mr. Guzman has been incarcerated in the United States for just over seven weeks, he has endured severe conditions since his arrest in Mexico in January of 2016. Mr. Guzman was kept in segregation in Mexico as well, but was allowed regular contact visits with his wife. Nonetheless, even while incarcerated in Mexico, Mr. Guzman had begun to exhibit psychological and physical ailments as a result of the conditions of his confinement.[12] However, his isolation at the MCC is far more extreme. As a result, Mr. Guzman's physical and mental health have deteriorated further since

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[12] Susan Darino a Spanish language interpreter, reviewed a report, dated August 24, 2016 and written by Dr. Julio Cesar Ayuzo Gonzalez, MD, a surgeon and specialist in psychiatry. This report was provided to a Mexican court in relation to Mr. Guzman's incarceration in Mexico. The report offered a forensic medical diagnosis of Mr. Guzman's condition at that time. Dr. Ayuzo concluded that Mr. Guzman was presenting physical signs and symptoms proving he was subject to maltreatment during his incarceration in Mexico. The symptoms indicated a generalized anxiety disorder and a mild neurocognitive disorder. Dr. Ayuzo also noted that Mr. Guzman had begun to experience mild auditory hallucinations. (Ms. Darino's summary of Dr. Ayuzo's forensic report can be provided *ex parte* upon request of the Court.)

his arrival in the United States. He has difficulty breathing and suffers from a sore throat and headaches. He has recently been experiencing auditory hallucinations, complaining of hearing music in his cell even when his radio is turned off.

B. <u>Effects of solitary confinement</u>

The government's imposition of the SAMs ignores the dangers that solitary confinement poses to a person's sanity. Those dangers are well-researched and well-known. As the Court of Appeals for the Third Circuit recently noted:

> A comprehensive meta-analysis of the existing literature on solitary confinement within and beyond the criminal justice setting found that "[t]he empirical record compels an unmistakable conclusion: this experience is psychologically painful, can be traumatic and harmful, and puts many of those who have been subjected to it at risk of long-term ... damage." Specifically, based on an examination of a representative sample of sensory deprivation studies, the researchers found that virtually *everyone* exposed to such conditions is affected in some way. They further explained that "[t]here is not a single study of solitary confinement wherein non-voluntary confinement that lasted for longer than 10 days failed to result in negative psychological effects." And as another researcher elaborated, "all [individuals subjected to solitary confinement] will ... experience a degree of stupor, difficulties with thinking and concentration, obsessional thinking, agitation, irritability, and difficulty tolerating external stimuli." Anxiety and panic are common side effects. Depression, post-traumatic stress disorder, psychosis, hallucinations, paranoia, claustrophobia, and suicidal ideation are also frequent results. Additional studies included in the aforementioned meta-analysis further 'underscored the importance of social contact for the creation and maintenance of "self." In other words, in the absence of interaction with others, an individual's very identity is at risk of disintegration.

Williams v. Sec'y Pennsylvania Dep't of Corr., __ F.3d __, 2017 WL 526483, at 11 (3d Cir. Feb. 9, 2017)

According to Dr. Stuart Grassian, of Harvard Medical School:

> [S]olitary confinement – that is confinement of a prisoner alone in a cell for all or nearly all of the day, with minimal environmental stimulation and minimal opportunity for social interaction – can cause severe psychiatric harm. This harm includes a specific syndrome which has been reported by many clinicians in a variety of settings, all of which have in common features of inadequate, noxious and/or restricted environmental and social stimulation. In more severe cases, this syndrome is associated with agitation, self-destructive behavior, and overt psychotic disorganization.

Stuart Grassian, *Psychiatric Effects of Solitary Confinement,* a redacted version of a declaration submitted in September 1993 in *Madrid v. Gomez,* 889 F. Supp. 1146 (N.D. Cal., 1995) *available at*

http://www.probono.net/prisoners/stopsolreports/417726.Psychiatrict_Effects_of_Solitary_Confinement_1993; *see also* Laura Rovner and Jeanne Theoharis, *Preferring Order to Justice*, 61 Am. U. L. Rev. 1331, 1358-1371 (June 2012)(summarizing the literature and cases on the effects of SAMs-imposed isolation, including mental and physical harm and the deterioration in a client's ability to assist in his own defense); Atul Gawande, *Hellhole*, The New Yorker (March 30, 2009); S. Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Washington University Journal of Law and Policy 325 (2006); C. Haney, *Mental health issues in long-term solitary and "supermax" confinement*, 49 Crime and Delinquency 124-156, 132 (2003)("[T]here is not a single published study of solitary . . . confinement in which nonvoluntary confinement lasting for longer than 10 days . . . failed to result in negative psychological effects. The damaging effects ranged in severity and included such clinically significant symptoms as hypertension, uncontrollable anger, hallucinations, emotional breakdowns, chronic depression, and suicidal thoughts and behavior.") The United Nations has described solitary confinement as a form of torture. *See* United Nations, *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2011) *available at* http://www.ohchr.org/Documents/HRBodies/HRCouncil/Regularsession/Session22/A.HRC.22.53_English.pdf; *accord* Human Rights Watch, *Submission to the United Nations Committee against Torture* (2014) *available at* http://www.hrw.org/news/2014/10/20/submission-united-nations-committee-against-torture.

In congressional testimony in the winter of 2014, Mr. Charles Samuels, Jr., then-Director of the BOP, acknowledged the hazards of solitary confinement and provided assurances that the BOP avoided them. He stated:

> Inmates placed in restrictive housing are not "isolated" as that term may be commonly understood. . . . In most circumstances, inmates placed in restrictive housing are able to interact with other inmates when they participate in recreation and can communicate with others housed nearby. They also have other opportunities for interaction with family and friends in the community (through telephone calls and visits), as well as access to a range of programming opportunities that can be managed in their restrictive housing settings.

Reassessing Solitary Confinement: The Human Right, Fiscal, and Public Safety Consequences, *Hearing before the Sen. Subcomm. on the Constitution, Civil Rights, and Human Rights Committee on the Judiciary* (February 24, 2014)(statement of Charles E. Samuels, Jr., Director, Federal Bureau of Prisons) *retrieved from* http://www.judiciary.senate.gov/imo/media/doc/02-25-14SamuelsTestimony.pdf.

Unfortunately, these reassurances do not apply to Mr. Guzman. Under the SAMs, he has no access to "programming opportunities," he may not "interact with other inmates when they participate in recreation," he may not "communicate with others housed nearby," and he has had no opportunity "for interaction with family and friends in the community" through either phone calls or visits. In short, Mr. Guzman, though presumed innocent, faces all the evils of prolonged solitary confinement.

II. ARGUMENT

A. The Court has jurisdiction to grant relief

As a threshold matter, the Court has jurisdiction to proceed on the defense motion to vacate or, in the alternative, to modify the SAMs. *United States. v. Hashmi*, 621 F. Supp. 2d 76, 84-86 (S.D.N.Y. 2008) (holding that a federal pretrial detainee can move directly in district court for relief from SAMs); *accord United States. v. Savage* 2010 WL 4236867, at 3-7 (E.D. Pa. Oct. 21, 2010); *Sattar v. Gonzales*, 2010 WL 685787, at 2 (D. Colo. Feb. 23, 2010); *United States. v. Lopez*, 327 F. Supp. 2d 138, 140-42 (D.P.R. 2004). The defendant need not exhaust his administrative remedies, as he would have to for an action under the Prison Litigation Reform Act, *see* 42 U.S.C. §1997e(a), because the present motion is not an "action" within the meaning of the Act. *Hashmi*, 621 F. Supp. 2d at 85 (finding that subject matter jurisdiction existed for challenge to SAMs because the PLRA does not govern motions by pretrial detainees); *see also United States v. Savage*, 2010 WL 4236867, at 6 (E.D. Pa. Oct. 21, 2010)("[o]ur survey of the case law reveals that every court that has considered the issue has found that a motion to remove SAMs that is filed pre-trial in a defendant's criminal case is not an "action" to which the PLRA applies"); *United States v. Mohamed*, 103 F. Supp. 3d 281, 285 (E.D.N.Y. 2015) (unlike post-conviction appeals initiated by prisoners, motions filed by pretrial detainees in government-initiated actions do not constitution "actions" under the PLRA and are therefore not barred). Accordingly, the Court has jurisdiction.

The Court also has jurisdiction, pursuant to 28 U.S.C. § 2241(c), because Mr. Guzman is in custody under or by color of the United States and is committed for trial before the United States District Court for the Eastern District of New York and because his present custody and confinement violates the Constitution and laws of the United States. The federal habeas corpus statute "draws no distinction between Americans and aliens held in federal custody . . . ." *Rasul v. Bush*, 542 U.S. 466, 481 (2004).

B. Applicable framework

The SAMs, as they are currently implemented, violate Mr. Guzman's Sixth Amendment rights to have effective assistance of counsel, develop a defense, and conduct a meaningful investigation; his Fifth Amendment right to due process; and his First Amendment right to free speech.

The applicable framework for evaluating an infringement on the constitutional rights of prisoners is the four-factor test enunciated in *Turner v. Safley*, 482 U.S. 78 (1987). The first question is whether there is a cognizable constitutional right or liberty interest that a prison policy or practice infringes. Once a right or liberty interest is established, the inquiry proceeds to whether a regulation which restricts that right is "reasonably related to legitimate penological objectives, and is therefore permissible, or whether it rather represents an "exaggerated response" to those concerns, and therefore is not permissible. *United States v. Hashmi*, 621 F. Supp. 2d 76, 86 (S.D.N.Y. 2008). To determine the validity of a prison regulation, the *Turner* test asks courts to consider the following four factors in making this determination:

1. Whether there is a valid, rational connection between the regulation and the legitimate governmental interest used to justify it;

2. Whether there are alternative means for the prisoner to exercise the right at issue;

3. What impact the desired accommodation will have on guards, other inmates, and prison resources, with an attention to whether the asserted right, if vindicated, would have a "ripple effect" on the prison; and

4. Whether there is an absence of ready alternatives to the regulation, where the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an "exaggerated response" to prison concerns.

Turner v. Safley, 482 U.S. 78, 90 (1987) (factors condensed and paraphrased); *see also United States v. Hashmi*, 621 F. Supp. 2d 76, 86 (S.D.N.Y. 2008).

In the context of pretrial detention, this test is slightly modified: because punishment and rehabilitation are not legitimate objectives for such individuals, the "legitimate penological interests" served must go "beyond the traditional objectives of rehabilitation or punishment." *United States v. El-Hage*, 213 F.3d 74, 81 (2d Cir. 2000). The *Turner* test is *not* a "least restrictive means" test– rather, the fourth factor asks "whether the prisoner has pointed to some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimis* cost to the valid penological goal." *Overton v. Bazzetta*, 539 U.S. 126, 136 (2003).

C. <u>As presently applied, the SAMs violate the right to counsel and should be immediately modified to allow Mr. Guzman to communicate with his family for the purpose of retaining counsel of his choice</u>

A criminal defendant has a Sixth Amendment and due process right to assistance of counsel; these constitutional guarantees also afford the defendant "a fair opportunity to secure counsel of his own choice." *Powell v. Alabama*, 287 U.S. 45, 53 (1932); *see also United States v. Gonzalez–Lopez*, 548 U.S. 140, 144 (2006); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624–25 (1989); *Wheat v. United States*, 486 U.S. 153, 159 (1988). Like the Sixth Amendment right to counsel, the Supreme Court has characterized the right to counsel of choice as "fundamental." *Luis v. United States*, 136 S. Ct. 1083, 1089 (2016). Where the right to be assisted by counsel of one's choice is wrongly denied, automatic reversal of a defendant's criminal conviction is required, as it is a structural defect in the process and thus not subject to harmless error analysis. *Gonzalez-Lopez*, 548 U.S. at 150. "The Sixth Amendment right to counsel includes not only an indigent's right to have the government appoint an attorney to represent him, but also the right of any accused, if he can provide counsel for himself by his own resources or through the aid of his family or friends, to be represented by an attorney of his own choosing." *see also United States v. Inman*, 483 F.2d 738, 739–40 (4th Cir.1973) (*per curiam*).

The government's refusal, pursuant to the SAMs, to permit any contact between Mr. Guzman and his wife, and or to allow lawyers to send and receive messages through third parties, for the limited purposes of ascertain and securing the funds necessary to retain counsel, violates Mr. Guzman's Fifth Amendment right to due process and his Sixth Amendment right to counsel. The

SAMs effectively deny Mr. Guzman any opportunity to retain counsel. While private attorneys who have received clearance are allowed to visit him, Mr. Guzman cannot make assurances to retain them because he is unable to communicate with the family members or friends who may have the ability to hire counsel on his behalf. The SAMs restrict non-legal telephone conversations, visits, and mail communications to direct family members who have been verified by the government. (SAMs § 3(a)(i); 3(f)(i); and 3(g)). To date, however, the government has refused to grant clearance to the only family member reasonably able to assist Mr. Guzman in these matters, his wife.[13] Similarly, pursuant to the SAMs, Mr. Guzman's appointed attorneys cannot communicate Mr. Guzman's wishes to family members nor discuss the logistics of obtaining funds.

The restrictions on Mr. Guzman's ability to communicate with family members parallel those imposed on the defendants in *Powell v. Alabama*, 287 U.S. 45, 53 (1932), which the Supreme Court held violated the Sixth Amendment. In *Powell*, the trial court denied defendants a fair opportunity to secure counsel "by moving to trial so quickly (six days after indictment) that the defendants had no chance to communicate with family or otherwise arrange for representation." *Luis v. United States*, 136 S. Ct. 1083, 1102 (2016) (Thomas, J., concurring) *citing Powell*, at 52-53.

The Supreme Court has acknowledged that practical restrictions may limit the right of choice of counsel and that a trial court should be given "wide latitude" in balancing a defendant's right to counsel of his choice against the needs of fairness, scheduling, and full representation. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006). These considerations are not present here, as the denial of choice of counsel has nothing to do with "a court's power to enforce rules or adhere to practices that determine which attorneys may appear before it, or to make scheduling and other decisions that effectively exclude a defendant's first choice of counsel." *Id.* Rather, restrictions extrinsic to fairness, court rules, and scheduling, have completely eliminated Mr. Guzman's ability to choose and retain counsel.

The *Turner* factors weigh in favor of granting Mr. Guzman the immediate modification requested: to allow Mr. Guzman to communicate with Ms. Coronel for the limited purposes of retaining private counsel, and permitting private attorneys to relay messages between Mr. Guzman and Ms. Coronel and other third parties as they determine necessary to ascertain if there is someone willing and able to provide the funds necessary to retain an attorney.

Turning to the first *Turner* factor, even the government has expressed its belief that Mr. Guzman would be more appropriately represented by a retained attorney. Because the requested immediate modification to the SAMs poses no security risk, there is no "rational connection between the regulation and the legitimate governmental interest" to justify a denial of the requested modification. *Turner v. Safley*, 482 U.S. 78, 90 (1987).

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[13] Ms. Coronel is a United States citizen and may freely travel to the United States, unlike the other members of Mr. Guzman's immediate family. Given that the government has made allegations generally against Mr. Guzman's "family members" and that there are currently federal indictments pending against his adult sons, it is extremely doubtful that there is another immediate family member who would be able to gain admission to the United States, much less clearance to meet with Mr. Guzman.

Additionally, application of restrictions beyond those contemplated in the SAMs indicates an inflexible and punitive implementation of the SAM restrictions. In *Basciano*, Judge Garaufis, upholding a SAMs order, found that "flexible implementation" of SAMs weighs in favor of the conclusion that they are "not punitive in nature." *Basciano v. Lindsay*, 530 F. Supp. 2d 435, 449 (E.D.N.Y. 2008). In the instant case, Mr. Guzman has been denied any communication with his wife for reasons undisclosed to defense counsel. This condition presents an obviously inflexible application of the SAMs, especially considering that the SAMs explicitly anticipate contact between Mr. Guzman and his immediate family. Generally, inmates' rights should be "infringed upon to the least possible degree, without compromising the asserted goal of restricting [them]." *United States v. Felipe*, 148 F.3d 101, 111 (2d Cir. 1998). The complete obstruction of Mr. Guzman's right to retain counsel of his choice cannot be described as the "least possible" infringement that could achieve the goals of the imposed conditions.

The effective complete ban on non-legal communication is in tension with the plain text of the SAMs and therefore should be construed as arbitrary and inflexible, both of which weigh in favor of modification of the conditions. Though the language of prison regulations does not confer justiciable rights or liberty interests upon prisoners, *Sandin v. Conner*, 515 U.S. 472, 473 (1995), inconsistent application of the SAMs as written may give rise to the inference that the complete ban on family contact is unreasonable. "[A] failure to abide by established procedures or standards can evince an improper objective" and may be evidence that prison officials are "not acting pursuant to a proper penological objective." *Shakur v. Selsky*, 391 F.3d 106, 116 (2d Cir. 2004).

Mr. Guzman's SAMs authorizes non-legally privileged telephone calls with "immediate family members," which includes his "spouse, children, parents, and siblings." (SAMs § 3(a)(i), fn.6). The SAMs further provides that the government shall set the quantity and duration of Mr. Guzman's calls to his family at "a minimum of one call per month," (SAMs § 3(a)(ii)). The guarantee of minimum phone calls, combined with the provision that the Director of the Office of Enforcement Operations, Criminal Division may "modify the inmate's SAM" as long as that does "not create a more restrictive SAM" indicate that prison officials and relevant authorities are not complying with the text of the SAMs, and instead are imposing stricter conditions. In such a case, the corrections official must be "prepared to demonstrate that is decision…is supported by reasonable justification." *Shakur*, 391 F.3d at 17.

Absent the ability to communicate with those who may be in a position to assist him to retain counsel, Mr. Guzman has no alternative means to exercise the right at issue. Additionally, considering *Turner* factors three and four, the SAMs already provide for contemporaneous monitoring and translation of all non-legal communications, as well as recording of phone calls. These conditions themselves proved an accommodation which will not burden guards, inmates, or prison resources, and allow Mr. Guzman to communicate with his family exclusively on the question of his preferences in retaining counsel. (SAMs § 3.)

The right to counsel– more specifically the right to choice of counsel– is a bedrock constitutional right. As the Supreme Court stated in *Luis,* "[g]iven the necessarily close working relationship between lawyer and client, the need for confidence, and the critical importance of trust, neither is it surprising that the Court has held that the Sixth Amendment grants a defendant 'a fair

opportunity to secure counsel of his own choice."' *Luis*, 136 S. Ct.at 1089. Without the requested immediate modification, the conditions imposed by the SAMs violate Mr. Guzman's Sixth Amendment right to counsel of his choice.

D. The SAMs are unwarranted and exceed regulatory authority

1. Regulations Provide for Two Different Types of Restrictions

The regulatory basis for SAMs envisions two types of restrictions. *See* 28 C.F.R. §501.3. The first "ordinarily may include housing the inmate in administrative detention and/or limiting certain privileges . . . as is reasonably necessary to protect persons against the risk of acts of violence or terrorism." 28 C.F.R. §501.3(a). This restriction requires "a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons . . . ." *Id.* The second type of restriction is much narrower, in both its nature and cause. It permits "appropriate procedures for the monitoring or review of communications between that inmate and attorneys . . . who are traditionally covered by the attorney-client privilege," but only "where the Attorney General specifically so orders, based on information . . . that reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism . . . ." 28 C.F.R. §501.3(d).

Here the government puts severe limits on the defense even though the Attorney General does not claim any reasonable suspicion for believing that the defendant might use his attorneys "to further or facilitate acts of terrorism." Thus, the whole set of restrictions limiting the defense lacks any regulatory basis at all. The first type of restrictions is little better. It extends beyond "limiting certain privileges" to depriving Mr. Guzman of the personal contacts and activities that any human being needs to remain sane and competent.

2. The SAMs restrictions on counsel are not authorized under the regulation

The regulatory basis for SAMs requires that restrictions on the Sixth Amendment be supported by more than allegations that a defendant may engage in "acts of violence or terrorism." *Cf.* 28 C.F.R. §501.3(a). Rather, the government must articulate facts that show a "reasonable suspicion" that, but for the SAMs, counsel would assist him in such heinous conduct. *See* 28 C.F.R. §501.3(d). Discussing the analogous situation of smuggling contraband into prison, the Seventh Circuit stated:

> To justify his impairment of communication between attorneys and inmates in the name of security, a prison warden must come forward with facts which tend to support a reasonable suspicion not only that contraband is being smuggled to inmates in the face of established preventive measures, but that their attorneys are engaged in the smuggling. We ground the last requirement on our unwillingness to assume that attorneys – admittedly the partisan advocates in court of their clients' cause – are more willing or more inclined to smuggle contraband past prison officials than are other outsiders who deal directly with inmates, as well as on our recognition of the

> constitutional importance of the business which an attorney typically conducts with an inmate . . . .

Adams v. Carlson, 488 F.2d 619, 631-32 (7th Cir. 1973).

The regulation's first type of restrictions "ordinarily" includes "administrative detention" and the curtailment of "certain privileges" that involve daily living, such as "correspondence, visiting, interviews with representatives of the news media, and use of the telephone . . . ." *See* 28 C.F.R. §501.3(a). Properly understood and applied by jailers, this first type of restrictions should not encroach upon the right to counsel. Indeed, a defendant's communication with counsel is not a mere "privilege"; it is a fundamental right guaranteed by the Sixth Amendment. *See generally Geders v. United States*, 425 U.S. 80, 91 (1976)(reversing and remanding because the trial court barred consultation between the defendant and his attorney during an overnight recess).

The regulation sharply distinguishes between, on the one hand, circumstances that may allow for an impairment of legal representation, and those that may allow for restrictive living conditions. Restrictions that impair attorney-client communications specifically require the Attorney General to make a finding that "reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism . . . ." 28 C.F.R. §501.3(d). The defect in the present SAMs is that they invoke the first but not the second type of restriction. The Attorney General has not issued a specific order based on an alleged reasonable suspicion that Mr. Guzman may use attorney-client communications "to further or facilitate acts of terrorism." Nevertheless, the SAMs significantly restrict the attorney-client relationship anyway.

The second section of the SAMs imposes wide-ranging restrictions on defense counsel. (SAMs § 2.) It limits which defense team members may meet with Mr. Guzman or may meet with him alone. It imposes case-by-case approvals for certain defense team members, making arbitrary distinctions between paralegals and investigators, and between FDNY employees and outside experts. It bars defense investigators from ever meeting alone with Mr. Guzman. It insists that only lawyers may "disseminate the contents of the inmate's communication," leaving unclear whether and how other defense team members can make use of information originating from the defendant. It never defines critical terms, such as "messages" and "the defense". It seeks to bar reviewing with the defendant "inflammatory material," without defining such material and, by its terms, even would prevent defense counsel from providing such material even if produced in discovery or necessary to prepare the defense. While the government states that the SAMs do not authorize the government to monitor privileged attorney-client communications the ambiguous formulations in the SAMs are open to other interpretations. (SAMs § 2(g)(ii)(3)(a), fn. 4; and § 2(g)(ii)(3)(d), fn. 3).

The government has imposed these defense restrictions without any showing that Mr. Guzman would, or could, use his attorneys "to facilitate acts of terrorism," or any other acts that "would entail the risk of death or serious bodily injury to persons." 28 C.F.R. §501.3. At the risk of stating the obvious, the Court has appointed defense counsel to represent Mr. Guzman. Neither defense counsel nor their staff previously knew Mr. Guzman. The government has presented no evidence that Mr. Guzman has tried to manipulate his attorneys. Unless contained in an *ex parte* filing, the government has made no allegations concerning defense counsel's willingness to facilitate

acts of terrorism or violence. Of course, we would never participate in such misconduct, and any allegations otherwise would be frivolous and could not give rise to reasonable suspicion.

Despite the lack of regulatory authority, these restrictions and ambiguities put defense counsel in the unenviable position of representing their client at risk of their own prosecution. Should we recoil from taking steps that effective counsel would ordinarily take in fear of violating ambiguities in the SAMs? Should we rely on the government's interpretations of the SAMs only to learn later that a court disagrees?

In short, since the second section of the SAMs has no basis at all in the regulation and unlawfully burdens the right to counsel, the Court should vacate it.

3. <u>The SAMs are not tailored specifically to Mr. Guzman</u>

The government maintains that the SAMs are reasonable necessary to prevent Mr. Guzman from committing additional crimes and are "the least restrictive means that can be tolerated" to avoid the "substantial risk that the [Mr. Guzman's] communications or contacts with persons could result in death or serious bodily injury to persons." (SAMs at 15-16.) However, the government has not tailored the SAMs to Mr. Guzman specifically. SAMs must be "prisoner-specific; that is, each prisoner upon whom SAMs are imposed has a set of SAMs issued for him, and him alone, based on the circumstances of his case." *See United States v. Reid*, 214 F. Supp. 2d 84, 87 (D. Mass. 2002). The SAMs imposed on Mr. Guzman, however, are not prisoner-specific. Instead, they are substantially similar to those imposed upon other defendants– ones whose circumstances were qualitatively different. *See e.g., United States v. Stewart*, 590 F.3d 93 (2nd Cir. 2009); *In re Basciano*, 542 F.3d 950 (2nd Cir. 2008); *United States. v. Tsarnaev*, No. 13-CR-10200-GAO (D. Mass. 2013).

In fact, many of the measures seem designed for a defendant charged with terrorism-related crimes that, perhaps, more commonly result in the imposition of SAMs. The rationale for the SAMs limitations on Mr. Guzman's reading material appears to be to prevent him from reading material that would inspire him to commit criminal or terrorist acts. (SAMs § 2(h)(i) and at 16-17). Similarly, the restriction on speaking to the media seems to be predicated on a belief that he may communicate, through the media, his desire for others to commit terrorist or criminal acts on his behalf. *Id.* These restrictions clearly seem to be aimed at those facing terrorism charges—people who have become radicalized through viewing incendiary material and may use the media to call on their followers to commit radical acts of terror. No such allegations have been made against Mr. Guzman. There is no justifiable security reason to limit the content of Mr. Guzman's reading material. Regarding Mr. Guzman's access to the media, defense counsel is not aware of any credible allegation by the government that Mr. Guzman has used the media to facilitate any crimes.

The government alleges that Mr. Guzman has escaped from custody twice: once in 2001 and, more recently, in 2015. It is worthy of note, that even by the government's own accounts, these incidents involved no violence or threat of force. Nor is defense counsel aware of any allegation of violence perpetrated by Mr. Guzman during the year he was in custody challenging his extradition to the United States. Additionally, defense counsel is not aware of a single complaint in the more than seven weeks Mr. Guzman has been in United States custody suggesting that he has been uncooperative, disruptive, or violated any BOP regulation. The same is true for Mr. Guzman's

behavior during his court appearances on January 20 and February 3, and during his meetings with defense counsel and Mexican consular officials in the Marshals pens in the courthouse.

Regarding the 2015 alleged escape by Mr. Guzman, the idea that Mr. Guzman secretly constructed a mile-long tunnel with the aid of confederates has been greeted with widespread skepticism. *See, e.g.,* William Neuman, *Mexicans Aren't Buying Official Account of "El Chapo' Escape*, N.Y. Times, Aug. 5, 2015.[14] The government apparently acknowledges that any such escape route would not have been possible without the assistance of corrupt prison officials in Mexico (SAMs at 3). No such danger exists while Mr. Guzman is held in BOP custody. In fact, at the government's press conference on January 20, 1017, Angel Melendez, Special Agent in Charge of ICE Homeland Security Investigations, scoffed at the idea of Mr. Guzman escaping from a prison in a city built on "bedrock." *See* U.S. Attorney Press Conf., *supra*, at 29:00 to 30:35. Given the acknowledged widespread corruption in the Mexican prison system, Mr. Guzman's alleged escape from custody while in prison there provides no basis for fearing that there is a danger that he will escape from BOP custody. Thus, the government's underlying allegations fail to support its position that Mr. Guzman poses a danger of escape from American custody.

The government's allegations in the Indictment, Detention Memorandum, and the SAMs, perpetuate the myths and legends that have surrounded Mr. Guzman for years. But the government has not offered any concrete examples of violence toward witnesses or continued criminal activity while in custody. Tellingly, the Superseding Indictment contains dates and quantities for alleged narcotics shipments, but not one specific allegation of violence directed toward a witness. The government joins in portrayals of Mr. Guzman as "the most notorious drug trafficker in the world" and alleges a "proven history of murdering individuals" who have cooperated with law enforcement or acted against his business interests. (Dkt. No. 17 at 3; SAMs at 3). Nonetheless, the government acknowledges that Mr. Guzman enjoys a far different reputation among many of the citizens of Mexico, where he was "viewed as a modern-day Robin Hood, popular with the down-trodden and extoled (sic) in popular songs. There was civil unrest and popular protests in the street of Mexico, condemning Mexican authorities" for Mr. Guzman's arrest. (Dkt. No. 17 at 11.)

Because the SAMs fail to make a factual showing that Mr. Guzman presents a danger of criminal activity or escape, their restrictions are unwarranted.

E. <u>The SAMs are unconstitutional</u>

Pretrial detention serves not to punish but rather to ensure public safety and the defendant's presence at trial. *See generally, Bell v. Wolfish*, 441 U.S. 520 (1979). Pretrial detainees "retain at least those constitutional rights that [the Supreme Court has] held are enjoyed by convicted prisoners," *id.* at 545, and their conditions of confinement may not be punitive. *Id.* at 535 ("[i]n evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against the deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee."); *see also City of Revere v.*

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[14] *available at* https://www.nytimes.com/2015/08/07/world/americas/mexicans-arent-buying-official-account-of-el-chapo-escape.html?_r=0;

Massachusetts General Hospital, 463 U.S. 239, 244 (1983)(the due process rights of a pretrial detainee "are at least as great as the Eighth Amendment protections available to a convicted prisoner.") In addition, when "an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security." *Bell*, 441 U.S. at 547.

In Mr. Guzman's case, the SAMs violate the Constitution without a sufficient justification related to public safety or institutional security.

1. <u>The SAMs thwart the effective assistance of counsel</u>

Effective assistance of counsel, guaranteed by the Sixth Amendment, is critical during the pre-trial stage. *E.g., Maine v. Moulton*, 474 U.S. 159, 170 (1985)("[T]o deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself."); *Wolfish v. Levi*, 573 F.2d 118, 133 (2d Cir. 1978)("[O]ne of the most serious deprivations suffered by a pretrial detainee is the curtailment of his ability to assist in his own defense."), *rev'd on other grounds Bell v. Wolfish*, 441 U.S. 520 (1979); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051 (8th Cir. 1989)(when access to counsel "is inadequately respected during pre-trial confinement, the ultimate fairness of their eventual trial can be compromised."). The Supreme Court has stated that "[r]egulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." *Procunier v. Martinez*, 416 U.S. 396, 419 (1974), *overruled in part on other grounds Thornburgh v. Abbott*, 490 U.S. 401, 419 (1989).

Government-imposed restrictions that interfere with defense counsel's ability to conduct a meaningful investigation and present a defense are grounds for reversing a criminal conviction. As explained in Professor LaFave's leading treatise on criminal procedure:

> The "right to the assistance of counsel," the Supreme Court noted in *Herring v. New York*, "has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary fact finding process." Accordingly, state action, whether by statute or trial court ruling, that prohibits counsel from making full use of traditional trial procedures may be viewed as denying defendant the effective assistance of counsel. In considering the constitutionality of such "state interference," courts are directed to look to whether the interference denied counsel "the opportunity to participate fully and fairly in the adversary fact finding process." If the interference had that effect, then both the overall performance of counsel apart from the interference and the lack of any showing of actual outcome prejudice become irrelevant. The interference in itself establishes ineffective assistance and requires automatic reversal of the defendant's conviction.

Wayne R. LaFave, et al., *Criminal Procedure* §11.8(a)(3d ed. 2012)(citations omitted).

The SAMs here severely impair defense counsel's ability to conduct a meaningful investigation and prepare a vigorous defense. Each of the following restrictions unconstitutionally

prejudices Mr. Guzman's Sixth Amendment rights and, therefore, is grounds for the Court to vacate, or modify, the SAMs.

i. <u>Limitation on the "dissemination" of communications</u>

The SAMs bar anyone except Mr. Guzman's counsel from "disseminat[ing] the contents of Mr. Guzman's communications to third parties . . . ." (SAMs § 2(d)). This provision is both overbroad and vague, for it leaves obscure the meaning of dissemination. Furthermore, this provision allows dissemination for "the sole purpose of preparing the inmate's defense – and not for any other reason." *Id.* This limitation is also vague and, and thus overly restrictive, leaving obscure the meaning of "defense."[8]

The "dissemination" of information is inevitable in any "investigation." Defense counsel routinely seek information from clients and use that information. Investigators, experts, and researchers may rely on such information and incorporate it into their inquiries. Fortunately, the government seems to agree: "The inmate's attorney may disseminate the contents of the inmate's communication to third parties for the sole purpose of preparing the inmate's defense . . ." (SAMs § 2(d)). But the language of the SAMs is unclear and too restrictive. If investigators, experts, and researchers cannot disseminate information learned from Mr. Guzman, they cannot conduct the complete inquiries needed to develop and present a defense and to provide the effective assistance of counsel required by the Sixth Amendment.

The limitation of "dissemination" to Mr. Guzman's counsel is unreasonable. Counsel cannot personally act as their own investigators, experts, and researchers. The charged offense conduct allegedly took place in various parts of the United States as well as Mexico and Columbia. Research and investigation may require investigation in those countries with the assistance of foreign investigators and witnesses. Such persons assisting with the investigation of the allegation may necessarily need to be privy to information received by defense counsel from Mr. Guzman.
One might venture a partial solution for avoiding inadvertent disclosures of communications from Mr. Guzman to third parties, namely, segregating information learned from Mr. Guzman from all other information. But that solution is impractical, if not impossible. The amount of information in this case is too vast; the ability of the mind to keep straight the origins of all information too weak. To always err on the side of caution would lure the defense into passivity rather than the zealousness that is demanded of any attorney.

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[8] This limitation is also inconsistent with the section governing Legal Mail, which states that counsel "may not send, communicate distribute, or divulge the inmate's mail, or any portion of its contents (legal otherwise), to third parties," without exception (SAMs § 2(i)). Read together, these two sections allow counsel to share information obtained from Mr. Guzman in person or by phone "for the purpose of preparing the defense," but prohibit counsel from sharing that very same information by mail under any circumstances for any purpose. Such disparate treatment of information obtained from Mr. Guzman based on the medium of communication is confusing, difficult to follow, and arbitrary and capricious.

Counsel should not have to forego using valuable information from their own client. Nor should counsel have to fear that using information, which anywhere else they would use in the normal course of their representation, exposes them to sanctions or prosecution for violating the SAMs. *See generally United States v. Stewart*, 686 F.3d 156 (2nd Cir. 2012) (affirming sentence of New York defense attorney Lynne Stewart to ten years in federal prison on charges that included violating SAMs).

In short, the SAMs provisions limiting the dissemination of communications severely impair the defense's ability to prepare a vigorous defense.

ii. <u>Undue restrictions on defense team members</u>

The SAMs limit contacts with Mr. Guzman to "precleared staff," defined as "a co-counsel, paralegal, and investigator who is actively assisting the inmate's . . . defense [and] who has submitted to a background check by the [government] . . . " (SAMs § 2(a) fn.2). But the SAMs lack an express provision for visits by outside experts retained by the defense.

The definition of "precleared staff" is unreasonably restrictive.[15] It excludes much of the staff of the Federal Defenders (those who are not co-counsel, paralegals, or investigators) as well as outside experts, even if they, too, have "submitted to a background check" and received clearance. With background checks and clearances in place, there is no rational basis for making these further distinctions among those assisting counsel in the defense. Even the need for ad hoc permission for visits creates bureaucratic obstacles that unduly burden Mr. Guzman's Sixth Amendment right to effective assistance of counsel.

The restrictions inherent in the definition of "precleared staff" are even more irrational and antagonistic to the Sixth Amendment in light of the atypical and complicated nature of this case. Mr. Guzman's defense will call for a series of experts and consultants of the kind that no law office would have in-house. The SAMs, by restricting which members of the defense team may meet with Mr. Guzman, will necessarily delay visits by those who must meet with him to assist the defense, but fall outside the SAMs arbitrary restrictions.

In short, the SAMs provisions limiting visits by any members of the defense team unfairly burden Mr. Guzman's Sixth Amendment right to counsel.

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[15] Further, the defendant objects to the clearance process which allows the very same Assistant U.S. Attorneys assigned to prosecute Mr. Guzman to screen all prospective visitors. This condition allows Mr. Guzman's prosecutors access to information about defense strategy. For example, defense counsel routinely retain psychological or other medical experts for the purpose of conducting a forensic evaluation of a defendant. Reports prepared by such experts may not be turned over to the prosecution or used at trial or sentencing. In such cases the prosecution has no right to know of the expert's work on the case.

iii. Irrational distinctions among defense team members

The SAMs permit a precleared paralegal to visit Mr. Guzman without an attorney but prohibit investigators and any other defense team members from visiting him alone (SAMs §§ 2(e) and (f)). The SAMs' distinctions among defense team members are arbitrary and capricious. The Ninth Circuit addressed this very issue. *See United States v. Mikhel*, 552 F.3d 961, 964 (9th Cir. 2009). In *Mikhel*, the Court failed to see "any valid, rational justification for distinguishing between paralegals and investigators employed by the office of the Federal Public Defender." *Id.; see also id.* ("[i]n order to be effective in providing investigative services, an investigator often needs to meet with the client."). The *Mikhel* Court then modified the SAMs to allow Federal Public Defender staff investigators who satisfied the government's preclearance requirements to meet with the defendant without defense counsel. *Id.* at 964-65. Such a change, the court found, would not impose any additional burden on the government or otherwise endanger guards, other inmates, or the allocation of prison resources. *Id.*

There is no more reason to distinguish among defense team members here than in *Mikhel*. Both paralegals and investigators must be precleared under the SAMs. (SAMs § 2(a) fn.2). Once precleared, paralegals and investigators have met the same standards of trustworthiness and have equally fulfilled the purposes of the SAMs. There is no logical reason why an investigator, like a paralegal, cannot meet alone with the defendant. The same point holds for outside experts, whose trustworthiness should be more than sufficient, once precleared, to meet alone with the defendant.

In short, the SAMs provisions that arbitrarily distinguish among those assisting in Mr. Guzman's defense unduly burden his Sixth Amendment right to counsel

iv. Severe limitations on legal phone calls

The SAMs state that precleared defense staff may communicate with Mr. Guzman by phone, but only when an attorney is physically present and participating in the call (SAMs § 2(g)(i)). Furthermore, a translator must be in the same room as the attorney and may not participate through a conference call (SAMs § 2(b)(ii)). As of the date of this motion, the MCC has not facilitated even one legal call, though defense counsel has requested calls. In practice, these provisions prevent phone consultations– an otherwise standard form of attorney-client communication– by creating two virtually insurmountable obstacles.

First, in prohibiting precleared defense staff (whose trustworthiness is assured through preclearance) from communicating alone with Mr. Guzman by phone, this provision hardens the irrational distinctions among defense team members noted above. Second, while allowing Mr. Guzman to initiate legally privileged phone calls in theory, the SAMs render such phone calls virtually impossible in practice. As noted above, Mr. Guzman rarely is able to communicate with the staff in his unit who largely do not speak Spanish. When he has requested calls, his requests were neither granted nor communicated to the defense team.

In short, the SAMs provisions that effectively prevent Mr. Guzman from consulting with counsel by phone unduly burden his Sixth Amendment right to counsel.

v. Restrictions on third-party communications

The SAMs bar counsel and the defense team from forwarding "third-party messages" and third-party mail to and from Mr. Guzman (SAMs §§ 2(a) and (i)). These provisions are vague, leaving the definition of "messages" obscure; they are also overbroad, barring counsel from conveying innocuous personal information to and from family members.

For a man in solitary confinement, contact with his family is critical for his mental well-being. Counsel is indispensable for helping to maintain that family contact, since his family lives abroad in Mexico. As noted above, as of the date of this letter, Mr. Guzman has had no direct contact with his family since arriving in New York. Prior to the imposition of the SAMs, defense counsel was helping maintain some contact with Mr. Guzman's family, by relaying communications about the well-being of family members. While defense counsel continues to maintain contact with Mr. Guzman's wife, the SAMs create doubt about what we can say beyond confirming that we have met with him. Can we convey what we otherwise would in the normal course, such as, that he is in poor health and low spirits? That he wants relatives to deposit money in his commissary account? Or that he sends his love and does not want them to worry?

There is no valid, non-punitive, reason why the SAMs should hinder defense counsel from helping Mr. Guzman convey to his immediate family personal messages, unrelated to his alleged offense conduct and which pose no security risk. These tasks are essential if counsel is to establish and maintain trust with our client and watch out for his mental well-being. By unreasonably thwarting such defense efforts, these provisions in the SAMs are fundamentally unfair and unduly burden the Sixth Amendment right to counsel.

2. The SAMs violate due process because they are punitive

The government may not subject inmates to unnecessarily harsh and isolating conditions of confinement. *See e.g. Wilkinson v. Austin*, 545 U.S. 209, 223 (2005)(protected liberty interests are implicated where prison regulations impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."). Thus, SAMs are unconstitutional in the absence of a showing that there is a reasonable necessity for the harsh conditions of confinement they impose. *See* 28 C.F.R. §501.3(a)(requiring SAMs to be "reasonably necessary to protect persons against the risk of death or serious bodily injury."); *see generally* Human Rights Committee, General Comment 20, Article 7 (44th session, 1992)(prolonged solitary confinement of a detained or imprisoned person may amount to a violation of article 7 of the International Covenant on Civil and Political Rights, which aims to protect both the individual's dignity and physical and mental integrity).

Though "freedom of association is among the rights least compatible with incarceration," the right to intimate association is not "altogether terminated" by incarceration, nor is it "always irrelevant to claims made by prisoners" *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003). While, courts generally uphold SAMs restrictions on visitation and communication, the defendants in those cases, unlike Mr. Guzman, had some alternate way to communicate. *See United States v. Felipe*, 148 F.3d 101, 110–11 (2d Cir. 1998)("with respect to defendant prisoner having alternative means of communicating and associating with others, we note that he retains the right to communicate with

prison employees (including pastoral, medical, and educational department staff), his attorney, and five individuals currently listed on his approved correspondence list"); *United States v. Mohamed*, 103 F. Supp. 3d 281, 291 (E.D.N.Y. 2015)("[d]efendant has alternative means of communicating with loved ones: he can send letters and make telephone calls"); *Basciano v. Lindsay*, 530 F. Supp. 2d 435, 449 (E.D.N.Y. 2008)(government efforts to increase number of phone calls and visitations with family members weighed in favor of SAM order). *See also United States v. Ali*, 396 F. Supp. 2d 703, 709–10 (E.D. Va. 2005) ("[a]lthough he may not communicate with other inmates or non-family visitors, Defendant retains the ability to meet with and talk to his attorneys and family members.")

Mr. Guzman now lives in near-total isolation. The SAMs prohibit him from even communicating with other inmates (SAMs §§ 6 and 7). The risks of such extreme solitary confinement, for his well-being and for his sanity, are dire (*see supra*). The danger posed by Mr. Guzman's solitary confinement is worsened by the SAM's restrictions that completely choke off his ability to communicate with his family.

3. <u>The SAMs restrictions on communication with the media violate the First and Sixth Amendments</u>

Given the widespread media attention to his case, and the tremendous number of fictionalized accounts of his life currently available and in production, the blanket prohibition on Mr. Guzman's ability to talk to the media unreasonably infringes on his First Amendment right to free speech and Sixth Amendment right to a fair and impartial jury. The restriction leaves Mr. Guzman with no ability to correct false accounts of his life that are widely available to the public.

With their blanket prohibition on non-legal communications with anyone other than immediate family members (SAMs §§ 3(a)(i); (f)(i) and 4), the SAMs unduly burden free speech and association rights. *E.g., Mohammed v. Holder*, 2011 WL 4501959, at 7-10 (D. Colo. 2011)(holding that the inmate's evidence was sufficient for a *prima facie* case that the SAMs that limited his communications to a narrow and specific list of persons violated the First Amendment); *Hale v. Ashcroft*, 2008 WL 4426095, at 4 (D. Colo. 2008)(SAMs' restrictions on communications with family members clearly "impaired" his "First Amendment interests"). The restrictions in the SAMs on group prayer also infringe on Mr. Guzman's right to the free exercise of his religion. (SAMs § 5(a)). *See e.g., Reid* v. *Wiley*, 2009 WL 1537879, at 3-7 (D. Colo. 2009)(denying a motion to dismiss a free exercise claim by a prisoner denied group prayer under SAMs).

Since the SAMs here violate Mr. Guzman's rights to free speech, association, and free exercise of religion, the Court should vacate or modify them.

III. CONCLUSION

We respectfully request that the Court grant the proposed immediate modifications of the SAMs to permit: 1) Mr. Guzman to speak with his wife, Emma Coronel, either in person or by telephone, for the limited purposes of communicating his choice of private counsel and determining the availability of assets necessary to retain such counsel; and 2) approved private attorneys to relay messages from Mr. Guzman to third parties and to relay messages from third parties to Mr. Guzman for the limited purposes of ascertaining and securing the assets necessary for their representation.

We further request that the Court vacate the SAMs in full, release Mr. Guzman from solitary confinement, and place him in the general prison population. Alternatively, the Court should vacate and/or modify certain sections and provisions of the SAMs. Further, if the Court is not prepared to grant the relief herein requested without further inquiry, the defendant requests an evidentiary hearing pursuant to *Turner v. Safley*, 482 U.S. 78 (1987); *United States v. El-Hage*, 213 F.3d 74, 82 (2d Cir. 2000); *see also United States v. Hashmi*, 621 F. Supp. 2d 76, 86 (S.D.N.Y. 2008). [16]

Thank you for your attention to this matter.

Respectfully submitted,

/s/

Michelle Gelernt, Esq.
Michael K. Schneider, Esq.
Edward Zas, Esq.

cc: Clerk of the Court [by ECF]
AUSA Patricia Notopoulos, Esq.
AUSA Andrea Goldbarg, Esq.
AUSA Michael Robotti, Esq.
AUSA Hiral Mehta, Esq.
Mr. Joaquin Guzman

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[16] The Second Circuit has found that, if the prisoner so desires, he may present his own witnesses and cross-examine any witnesses that the government calls at the *Turner* hearing. *United States v. El-Hage*, 213 F.3d at 82 (2d Cir. 2000).

Office of the Attorney General
Washington, D.C. 20530

LIMITED OFFICIAL USE

MEMORANDUM FOR: THOMAS R. KANE
ACTING DIRECTOR
FEDERAL BUREAU OF PRISONS

FROM: THE ACTING ATTORNEY GENERAL 2-3-17

SUBJECT: Origination of Special Administrative Measures Pursuant to 28 C.F.R. § 501.3 for Federal Bureau of Prisons Pretrial Inmate Joaquin Archivaldo Guzman Loera, aka El Chapo (Guzman)

On May 11, 2016, a grand jury in the Eastern District of New York returned a fourth superseding indictment charging Guzman with seventeen counts, including one count of leading a Continuing Criminal Enterprise, which includes eighty-five violations, including a murder conspiracy, several international cocaine trafficking charges and other narcotics trafficking charges, unlawful use of a firearm in relation to drug trafficking and a money laundering conspiracy. Guzman, a Mexican national, faces a mandatory life sentence if convicted of the Continuing Criminal Enterprise count, and faces a maximum sentence of life on nearly all of the other counts. Guzman was extradited to the United States on January 19, 2017, and is currently incarcerated at the Metropolitan Correction Center (MCC) in New York, New York, where he is awaiting trial.

The United States Attorney's Office for the Eastern District of New York (USA/EDNY) has requested that Special Administrative Measures be authorized on Guzman. The United States Attorney's Office for the Southern District of Florida, Drug Enforcement Administration (DEA), U.S. Department of Homeland Security, Homeland Security Investigations (HSI), Federal Bureau of Investigation (FBI) and Narcotic and Dangerous Drug section concur in this request.

Guzman is the long-time head of the Sinaloa Cartel in Mexico, which has been described as the largest and most powerful drug trafficking organization in the Western Hemisphere. Despite having been incarcerated three times in Mexico, from 1993 to 2001, then from February 2014 until July 2015, and most recently from January 2016 through January 2017, Guzman continued to manage the affairs of the Sinaloa Cartel and coordinated his escape from two different maximum security facilities in Mexico.

The USA/EDNY reports that Guzman's involvement in drug trafficking, corruption, and violence is vast and extensive. By his own admission, Guzman started at the age of fifteen

cultivating marijuana and growing poppies for heroin production, which he sold for a living. Over the next forty years, Guzman devoted his efforts to growing his drug trafficking organization and increasing and enhancing the power of the Sinaloa Cartel, often through torture and murder. As the leader of the Sinaloa Cartel, Guzman operated with impunity at the highest level of the Mexican drug trafficking world, while being assured of his continued success and safety from arrest through his payment of bribes to government officials and law enforcement officers. Guzman's stewardship of the Sinaloa Cartel is directly responsible for a large portion of the cocaine, heroin, methamphetamine and marijuana sold in the United States that has resulted in thousands of deaths each year.

In addition to the cocaine Guzman purchased from Colombian suppliers, he manufactured heroin, methamphetamine, and marijuana for distribution in the United States. He also oversaw a vast transportation infrastructure in Central America, where cocaine is received from Colombian sources of supply, and in Mexico, where multi-ton shipments of cocaine, heroin, methamphetamine, and marijuana are transported to the Mexico-U.S. border. As Guzman grew in power, he established his own network in Colombia to eliminate the need for a Colombian middleman, giving him and his cartel a direct line to the source of the cocaine. Guzman controlled corrupt government officials and law enforcement officers at all levels of the Mexican government, who protected the drug shipments and his workers as the drugs were transported across Mexico. He controlled border crossing sites into the United States, and used various means of smuggling drugs into the United States, including the construction of tunnels. Guzman maintained drug distribution networks throughout the United States, and during his reign of power, maintained an arsenal of military-grade weapons for protection. His heavily-armed private security forces were used not only as personal bodyguards, but also as protection for his drug shipments as they were transported throughout Mexico. Guzman also maintained a stable of "sicarios" (hitmen), who carried out gruesome assassinations aimed at maintaining discipline within the Cartel, protecting against challenges from rivals, and silencing those who cooperated with law enforcement against his interests. According to the USA/EDNY, the nature and circumstances of the charged offenses establish that Guzman is a danger to the community, not only because of the virulent nature of his drug trafficking activity, but also because of his unrestrained use of violence.

During his three periods of incarceration in Mexico, Guzman was able to continue managing his drug trafficking operations. He also successfully plotted escapes from jail, first in 2001 and again in 2015, using various methods of subterfuge, to include allegedly using his Mexican lawyers and family members to pass messages in and out of prison to individuals associated with the Sinaloa Cartel. In addition, his Mexican lawyers and family members were allegedly integrally involved in engineering Guzman's elaborate escape plan. Further, several employees at the prison were arrested and are being investigated by the Mexican Government for potential corruption associated with his escape in 2015. Once free, Guzman continued to oversee the Cartel and its drug trafficking activities.

While incarcerated from 1993 to 2001, Guzman continued to build his violent, multi-national and multi-billion dollar drug trafficking empire and continued to export thousands of kilograms of cocaine, heroin, methamphetamine, and marijuana into the United States. He escaped from prison in 2001, purportedly while hiding in a laundry cart. After his second arrest in February 2014, Guzman continued to oversee and operate the Sinaloa Cartel, despite being incarcerated at the maximum security Altiplano Prison in Mexico. He engineered his escape from the prison through a mile-long tunnel in part by passing messages to family members and lawyers, and with the aid of the corrupt prison workers. The USA/EDNY believes that, based on Guzman's prior history, unless he is incarcerated under strict security arrangements, the risk of his continued criminal activity is certain.

In addition, Guzman has a proven history of murdering individuals whom he perceived as having provided information to law enforcement or acting against his interests. Therefore, witnesses for the government and their families, many of whom still reside outside of the U.S. and have no protection, would be in grave danger of physical harm, or even death, as reprisal for their cooperation with the government. The USA/EDNY believes that Guzman will continue to be a danger if he is allowed to have access to other inmates and to communicate with others in the Sinaloa Cartel.

According to the USA/EDNY, there is ample evidence that Guzman is an extremely violent individual who, as one of the leaders of the Sinaloa Cartel, has unparalleled connections to its worldwide members. Given Guzman's leadership status, his demonstrated violent tendencies towards any threat to him and his organization, and his history of escapes from maximum security prisons, the USA/EDNY believes that, absent SAM, Guzman's unrestricted communications or contacts with other persons would pose a substantial risk of death or serious injury to the community.

Based upon information provided to me regarding Guzman's proclivity for violence, I find that there is substantial risk that his communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of serious bodily injury to persons. Therefore, I am requesting that you, pursuant to 28 C.F.R. § 501.3, implement SAM to restrict Guzman's access to the mail, the media, the telephone, and visitors. Implementation of the SAM will commence immediately upon notice to the inmate, and the SAM will be in effect for one year from the date of my approval, subject to my further direction or the direction of a designated delegee.

1. **General Provisions**

a. **Adherence to Usual USMS, BOP, and Detention Facility (DF) Policy Requirements** - In addition to the below-listed SAM, the inmate must comply with all usual USMS, BOP, and non-BOP DF policies regarding restrictions, activities, privileges, communications, etc. If there is a conflict between USMS/BOP/DF policies and the SAM, as set forth herein, where the SAM are more restrictive than usual USMS/BOP/DF policies, then the SAM shall control. If usual USMS/BOP/DF policies are more restrictive than the SAM, then USMS/BOP/DF policies shall control.

b. **Interim SAM Modification Authority** - During the term of this directive, the Director, Office of Enforcement Operations (OEO), Criminal Division, may modify the inmate's SAM as long as any SAM modification authorized by OEO:

i. Does not create a more restrictive SAM;

ii. Is not in conflict with the request of the USA/EDNY, DEA/HSI/FBI, or USMS/BOP/DF, or applicable regulations; and

iii. Is not objected to by the USA/EDNY, DEA/HSI/FBI, or USMS/BOP/DF.

c. **Inmate Communications Prohibitions** - The inmate is limited, within the USMS/BOP/DF's reasonable efforts and existing confinement conditions, from having contact (including passing or receiving any oral, written, or recorded communications) with any other inmate, visitor, attorney, or anyone else, except as outlined and allowed by this document, that could reasonably foreseeably result in the inmate communicating (sending or receiving) information that could circumvent the SAM's intent of significantly limiting the inmate's ability to communicate (send or receive) threatening information.

d. **Use of Interpreters/Translators by the USMS/BOP/DF** - Interpreter/Translator approval requirement:

i. The USMS/BOP/DF may use Department of Justice (DOJ) approved interpreters/translators as necessary for the purpose of facilitating communication with the inmate.

ii. No person shall act as an interpreter/translator without prior written clearance/approval from the USMS/BOP/DF, which shall only be granted after consultation with the USA/EDNY and DEA/HSI/FBI.

iii. Interpreters/translators utilized by the USMS/BOP/DF shall not be allowed to engage in, or overhear, unmonitored conversations with the inmate. Interpreters/translators shall not be alone with the inmate, either in a room or on a telephone or other communications medium.

2. **Attorney-Client Provisions**

a. **Attorney[1] Affirmation of Receipt of the SAM Restrictions Document** - The inmate's attorney (or counsel) -- individually by each if more than one -- must sign an affirmation acknowledging receipt of the SAM restrictions document. By signing the affirmation, the attorney acknowledges his or her awareness and understanding of the SAM provisions and his or her agreement to abide by these provisions, particularly those that relate to contact between the inmate and his attorney and the attorney's staff. The signing of the affirmation does not serve as an endorsement of the SAM or the conditions of confinement, and does not serve to attest to any of the factors set forth in the conclusions supporting the SAM. However, in signing the affirmation, the inmate's attorney and precleared staff[2] acknowledge the restriction that they will not forward third-party messages to or from the inmate.

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[1] The term "attorney" refers to the inmate's attorney of record, who has entered an appearance in this criminal case, who has been verified and documented by the USA/EDNY, and who has received and acknowledged receipt of the SAM restrictions document. As used in this document, "attorney" also refers to more than one attorney where the inmate is represented by two or more attorneys, and the provisions of this document shall be fully applicable to each such attorney in his or her individual capacity.

[2] "Precleared," when used with regard to an attorney's staff, or "precleared staff member," refers to a co-counsel, paralegal, or investigator who is actively assisting the inmate's attorney with the inmate's defense, who has submitted to a background check by the DEA/HSI/FBI and USA/EDNY, who has successfully been cleared by the DEA/HSI/FBI and USA/EDNY, and who has received a copy of the inmate's SAM and has agreed -- as evidenced by his or her signature -- to adhere to the SAM restrictions and requirements. As used in this document, "staff member" also refers to more than one staff member, and the provisions of this document shall be fully applicable to each such staff member in his or her individual capacity. A "paralegal" will also be governed by any additional DF rules and regulations concerning paralegals.

i. The USA/EDNY shall present, or forward, the attorney affirmation of receipt of the SAM restrictions document to the inmate's attorney.

ii. After initiation of the SAM and prior to the inmate's attorney being permitted to have attorney-client privileged contact with the inmate, the inmate's attorney shall execute a document affirming receipt of the SAM restrictions document and return the original to the USA/EDNY.

iii. The USA/EDNY shall maintain the original of the SAM acknowledgment document and forward a copy of the signed document to OEO in Washington, D.C., and the USMS/BOP/DF.

b. **Attorney Use of Interpreters/Translators -**

i. **Necessity Requirement** - No interpreter/translator shall be utilized unless absolutely necessary where the inmate does not speak a common language with the attorney. Any interpreter/translator shall be precleared.

ii. **Attorney Immediate Presence Requirement** - Any use of an interpreter/translator by the attorney shall be in the physical and immediate presence of the attorney -- *i.e.*, in the same room. The attorney shall not patch through telephone calls, or any other communications, to or from the inmate.

iii. **Translation of Inmate's Correspondence** - An attorney of record may only allow a federally approved interpreter/translator to translate the inmate's correspondence as necessary for attorney-client privileged communication.

c. **Attorney-Client Privileged Visits** - Attorney-client privileged visits may be contact or non-contact, at the discretion of the USMS/BOP/DF.

d. **Attorney May Disseminate Inmate Conversations** - The inmate's attorney may disseminate the contents of the inmate's communication to third parties for the sole purpose of preparing the inmate's defense -- and not for any other reason -- on the understanding that any such dissemination shall be made solely by the inmate's attorney, and not by the attorney's staff.

e. **Unaccompanied Attorney's Precleared Paralegal(s) May Meet With Client -** The inmate's attorney's precleared paralegal(s) may meet with the inmate without

the need for the inmate's attorney to be present. These meetings may be contact or non-contact, at the discretion of the USMS/BOP/DF.

f. **Simultaneous Multiple Legal Visitors** - The inmate may have multiple legal visitors provided that at least one of the multiple legal visitors is the inmate's attorney or precleared paralegal. These meetings may be contact or non-contact, at the discretion of the USMS/BOP/DF. An investigator or interpreter/translator may not meet alone with the inmate.

g. **Legally Privileged Telephone Calls** - The following rules refer to all legally privileged telephone calls or communications:

i. **Inmate's Attorney's Precleared Staff May Participate in Inmate Telephone Calls** - The inmate's attorney's precleared staff are permitted to communicate directly with the inmate by telephone, provided that the inmate's attorney is physically present and participating in the legal call as well.

ii. **Inmate's Initiation of Legally Privileged Telephone Calls** - Inmate-initiated telephone communications with his attorney or precleared staff are to be placed by a USMS/BOP/DF staff member and the telephone handed over to the inmate only after the USMS/BOP/DF staff member confirms that the person on the other end of the line is the inmate's attorney. This privilege is contingent upon the following additional restrictions:

(1) The inmate's attorney will not allow any non-precleared person to communicate with the inmate, or to take part in and/or listen to or overhear any communications with the inmate.

(2) The inmate's attorney must instruct his or her staff that:

(a) The inmate's attorney and precleared staff are the only persons allowed to engage in communications with the inmate.

(b) The attorney's staff (including the attorney) are not to patch through, forward, transmit, or send the inmate's calls, or any other communications, to third parties.

(3) No telephone call/communication, or portion thereof, except as specifically authorized by this document:

(a) Is to be overheard by a third party.[3]

(b) Will be patched through, or in any manner forwarded or transmitted, to a third party.

(c) Shall be divulged in any manner to a third party, except as otherwise provided in Section 2.d. above.

(d) Shall be in any manner recorded or preserved.[4] The inmate's attorney may make written notes of attorney-client privileged communications.

(4) If the USMS/BOP/DF, DEA/HSI/FBI, or USA/EDNY determines that the inmate has used or is using the opportunity to make a legal call to speak with another inmate or for any other non-legal reason that would circumvent the intent of the SAM, the inmate's ability to contact his attorney by telephone may be suspended or eliminated.

h. **Documents Provided by Attorney to Inmate** - During a visit, the inmate's attorney may provide the inmate with, or review with the inmate, documents related to his defense, including discovery materials, court papers (including indictments, court orders, motions, etc.), and/or material prepared by the inmate's attorney, so long as any of the foregoing documents are translated, if translation is necessary, by a precleared interpreter/translator. Any documents not related to the inmate's defense must be sent to the inmate via general correspondence and will be subject to the mail provisions of subparagraphs 2.i. and 3.g. Documents previously reviewed and cleared for receipt by the inmate, and already in the

[3] For purposes of the SAM, "third party" does not include officials of the USMS/BOP/DF, DEA/HSI/FBI, DOJ, or other duly authorized federal authorities when acting in connection with their official duties. This section does not allow monitoring of attorney-client privileged communications.

[4] Except by the USMS/BOP/DF, DEA/HSI/FBI, DOJ, or other duly authorized federal authorities. This section does not allow monitoring of attorney-client privileged communications.

inmate's possession at the outset of the visit, may be discussed or reviewed by the inmate and the inmate's attorney during the visit.

i. None of the materials provided may include inflammatory materials, materials inciting violence, military training materials, or materials that may be used to pass messages from inmate to inmate, unless such materials have been precleared by the USA/EDNY and DEA/HSI/FBI.

ii. The USA/EDNY may authorize additional documents to be presented to the inmate. If any document not listed or described above needs to be transmitted to the inmate, consent for the transmission of the document may be obtained from the USA/EDNY without the need to formally seek approval for an amendment to the SAM.

i. **Legal Mail**[5] - The inmate's attorney may not send, communicate, distribute, or divulge the inmate's mail (legal or otherwise), or any portion of its contents, to third parties, except when disclosure of the contents is necessary for the sole purpose of providing necessary legal services related to the inmate's defense -- and not for any other reason.

In signing the SAM acknowledgment document, the inmate's attorney and precleared staff will acknowledge the restriction that only inmate case-related documents will be presented to the inmate, and that the attorney and his or her staff are strictly prohibited from forwarding third-party mail to or from the inmate.

3. **Inmate's Non-legal Contacts**

a. **Non-legally Privileged Telephone Contacts** -

i. The inmate is only authorized to have non-legally privileged telephone calls with his immediate family members.[6]

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[5] "Legal mail" is defined as properly marked correspondence (marked "Legal Mail") addressed to or from the inmate's attorney. All other mail, including that otherwise defined by the USMS/BOP/DF as Special Mail, shall be processed as "non-legal mail."

[6] The inmate's "immediate family members" are defined as the inmate's (USMS/BOP/DF- or DEA/HSI/FBI -verifiable) spouse, children, parents, and siblings. Requests for additional non-

ii. The quantity and duration of the inmate's non-legally privileged telephone calls with his immediate family members shall be set by the USMS/BOP/DF, with a minimum of one call per month.

b. **Rules for Telephone Calls** - For all non-legally privileged telephone calls or communications, no telephone call/communication, or portion thereof:

i. Is to be overheard by a third party.

ii. Is to be patched through, or in any manner forwarded or transmitted, to a third party.

iii. Shall be divulged in any manner to a third party.

iv. Shall be in any manner recorded or preserved.[7]

All telephone calls shall be in English unless a fluent USMS/BOP/DF- or DEA/HSI/FBI- approved interpreter/translator is available to contemporaneously monitor the telephone call. Arranging for an interpreter/translator may require at least fourteen (14) days advance notice.

c. **Telephone SAM Restriction Notifications** - For all non-legally privileged telephone calls to the inmate's immediate family member(s):

i. The USMS/BOP/DF shall inform the inmate of the telephone SAM restrictions prior to each telephone call.

ii. The USMS/BOP/DF shall verbally inform the inmate's immediate family member(s) on the opposite end of the inmate's telephone communication of the SAM restrictions. The USMS/BOP/DF is only required to notify the inmate's communication recipient in English.

iii. The USMS/BOP/DF shall document each such telephone notification.

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legal contacts may be submitted and will be considered on a case-by-case basis.

[7] Except by the USMS/BOP/DF, DEA/HSI/FBI, DOJ, or other duly authorized federal authorities.

d. **Family Call Monitoring** - All calls with the inmate's immediate family member(s) may be:

i. Contemporaneously monitored by the DEA/HSI/FBI.

ii. Contemporaneously recorded (as directed by the DEA/HSI/FBI) in a manner that allows such telephone calls to be analyzed for indications the call is being used to pass messages soliciting or encouraging acts of violence or other crimes, or to otherwise attempt to circumvent the SAM.

iii. A copy of each telephone call recording involving an inmate/immediate family member shall be provided to the DEA/HSI/FBI by the USMS/BOP/DF. These recordings shall be forwarded on a call-by-call basis as soon as practicable.

e. **Improper Communications** - If telephone call monitoring or analysis reveals that any call or portion of a call involving the inmate contains any indication of a discussion of illegal activity, the soliciting of or encouraging of acts of violence or other crimes, or actual or attempted circumvention of the SAM, the inmate shall not be permitted any further calls to his immediate family members for a period of time to be determined by the USMS/BOP/DF. If contemporaneous monitoring reveals such inappropriate activity, the telephone call may be immediately terminated.

f. **Non-legal Visits** -

i. **Limited Visitors** - The inmate shall be permitted to visit only with his immediate family members. The visitor's identity and family member relationship to the inmate will be confirmed by the USMS/BOP/DF and DEA/HSI/FBI in advance.

ii. **English Requirement** - All communications during non-legal inmate visits will be in English unless a fluent USMS/BOP/DF- or DEA/HSI/FBI-approved interpreter/translator is readily available to contemporaneously monitor the communication/visit. Arranging for an interpreter/translator may require at least fourteen (14) days advance notice.

iii. **Visit Criteria** - All non-legal visits may be:

(1) Contemporaneously monitored by the USMS/BOP/DF and/or DEA/HSI/FBI, in a manner that allows such visits to be analyzed for indications the visit is being used to pass messages soliciting or encouraging acts of violence or other crimes, or to otherwise attempt to circumvent the SAM.

(2) Permitted only with a minimum of fourteen (14) calendar days advance written notice to the USMS/BOP/DF facility where the inmate is housed.

(3) Without any physical contact. All such meetings shall be non-contact to protect against harm to visitors or staff.

(4) Limited to one adult visitor at a time. However, the DEA/HSI/FBI-verified children of the inmate may visit with a pre-approved adult visitor.

g. **Non-legal Mail** - Non-legal mail is any mail not clearly and properly addressed to/from the inmate's attorney and marked "Legal Mail" (incoming or outgoing). Non-legal mail is only authorized with the inmate's immediate family, U.S. courts, federal judges, U.S. Attorneys' Offices, members of U.S. Congress, the BOP, or other federal law enforcement entities.

i. **General correspondence with limitations** - Correspondence is only authorized with immediate family members. The volume and frequency of outgoing general correspondence with immediate family members may be limited to three pieces of paper (not larger than 8 ½" x 11"), double-sided, once per calendar week to a single recipient, at the discretion of the USMS/BOP/DF. The identity and family member relationship to the inmate will be confirmed by the USMS/BOP/DF and DEA/HSI/FBI.

ii. **General correspondence without limitations** -There is no volume or frequency limitation on correspondence to/from U.S. courts, federal judges, U.S. Attorneys' Offices, members of U.S. Congress, the BOP, and other federal law enforcement entities, unless there is evidence of abuse of these privileges, threatening correspondence is detected, circumvention of the SAM is detected, or the quantity to be processed becomes unreasonable to the extent that efficient processing to protect the security, good order, or discipline of the institution, the public, or national security may be jeopardized.

iii. All non-legal mail shall be -

(1) **Copied** - Shall be copied (including the surface of the envelope) by the warden, or his or her designee, of the facility in which the inmate is housed.

(2) **Forwarded** - Shall be forwarded, in copy form, to the location designated by the DEA/HSI/FBI.

(3) **Analyzed** - After government analysis and approval, if appropriate, the inmate's incoming/outgoing non-legal mail shall be forwarded to the USMS/BOP/DF for delivery to the inmate (incoming), or directly to the addressee (outgoing).

iv. The federal government shall forward the inmate's non-legal mail to the USMS/BOP/DF for delivery to the inmate or directly to the addressee after a review and analysis period of:

(1) A reasonable time not to exceed fourteen (14) business days for mail that is written entirely in the English language.

(2) A reasonable time not to exceed sixty (60) business days for any mail that includes writing in any language other than English, to allow for translation.

(3) A reasonable time not to exceed sixty (60) business days for any mail where the federal government has reasonable suspicion to believe that a code was used, to allow for decoding.

v. **Mail Seizure** - If outgoing/incoming mail is determined by the USMS/BOP/DF or DEA/HSI/FBI to contain overt or covert discussions of or requests for illegal activities, the soliciting or encouraging of acts of violence or other crimes, or actual or attempted circumvention of the SAM, the mail shall not be delivered/forwarded to the intended recipient but referred to the DEA, HSI, FBI for appropriate action. The inmate shall be notified in writing of the seizure of any mail.

4. **Communication With News Media**

The inmate shall not be permitted to speak, meet, correspond, or otherwise communicate with any member or representative of the news media in person; by telephone; by furnishing a recorded message; through the mail, his attorney, or a third party; or otherwise.

5. **Religious Visitation**

a. The inmate shall not be allowed to engage in group prayer with other inmates.

b. If a USMS/BOP/DF- and/or DEA/HSI/FBI-approved religious representative is to be present for prayer with the inmate, the prayer shall be conducted as part of a contact or non-contact visit, at the discretion of the USMS/BOP/DF.

6. **No Communal Cells and No Communication Between Cells**

a. The inmate shall not be allowed to share a cell with another inmate.

b. The inmate shall be limited within the USMS/BOP/DF's reasonable efforts and existing confinement conditions, from communicating with any other inmate by making statements audible to other inmates or by sending notes to other inmates.

7. **Cellblock Procedures**

a. The inmate shall be kept separated from other inmates as much as possible while in the cellblock area.

b. The inmate shall be limited, within the USMS/BOP/DF's reasonable efforts and existing confinement conditions, from communicating with any other inmate while in the cellblock area.

8. **Access to Mass Communications**

To prevent the inmate from receiving and acting upon critically timed information or information coded in a potentially undetectable manner, the inmate's access to materials of mass communication is restricted as follows:

a. **Publications/Newspapers -**

i. The inmate may have access to publications determined not to facilitate

criminal activity or be detrimental to national security; the security, good order, or discipline of the institution; or the protection of the public. This determination is to be made by the USMS/BOP/DF, in consultation with the USA/EDNY. The inmate may correspond with the publishing company regarding technical aspects of the publication, i.e., availability of particular volumes, billing questions, etc. The review of this correspondence will be in accordance with section 8(a)(iii), below.

ii. Sections of any publication/newspaper that offer a forum for information to be passed by unknown and/or unverified individuals, including but not limited to classified advertisements and letters to the editor, should be removed from the publications/newspapers prior to distribution to the inmate.

iii. If restricted by the USMS/BOP/DF rules, access to a publication will be denied. If acceptable, upon delivery, the USMS/BOP/DF will review the publication and make the initial determination. If the DEA's, HSI's, or FBI's expertise is required, the publication will be forwarded to the DEA, HSI, or FBI for review. The USMS/BOP/DF will also forward the publication to the DEA, HSI, or FBI if translations are needed to make that determination. (In these cases, the DEA, HSI, or FBI shall respond to the USMS/BOP/DF within fourteen (14) business days.) The inmate shall then have access to the remaining portions of the publications/newspapers deemed acceptable, in accordance with USMS/BOP/DF policy.

iv. In order to avoid passing messages/information from inmate to inmate, the inmate shall not be allowed to share the publication(s) with any other inmates.

b. **Television and Radio** - The inmate is authorized to have television and radio viewing and listening privileges, in accordance with standard and applicable USMS/BOP/DF policies and procedures.

c. **Termination or Limitation** - If the USMS/BOP/DF determines that mass communications are being used as a vehicle to send messages to the inmate relating to the furtherance of terrorist or criminal activities, the inmate's access may be limited or terminated for a period of time to be determined by the USMS/BOP/DF.

9. <u>Access to Books</u>

The inmate may have access to all books that do not facilitate criminal activity or present a substantial threat to national security or the security, discipline, or good order of the institution. This initial determination is to be made by the USMS/BOP/DF and, if the USMS/BOP/DF determines that the DEA's, HSI's, or FBI's expertise is required, the book(s) will be forwarded to the DEA/HSI/FBI for review. In conducting its analysis, the DEA/HSI/FBI will determine whether the book advocates or promotes acts of violence or other crimes and/or whether access to the book by this particular inmate would pose a substantial threat to national security.

In order to avoid passing messages/information from inmate to inmate, the inmate shall not be allowed to share books with any other inmates.

10. **Transfer of Custody**

In the event that the inmate is transferred to or from the custody of the USMS, BOP, or any other DF, the SAM provisions authorized for this inmate shall continue in effect, without need for any additional DOJ authorization.

11. **Inmate's Consular Contacts**

The inmate, who is a citizen of a foreign country, shall be allowed Consular communications and visits, consistent with USMS/BOP/DF policy. The Consular contacts shall comply with the U.S. Department of State (DOS) Consular notification and access requirements. Prior to permitting any Consular contact, the FBI will verify the Consular representative's credentials with the DOS.[8]

CONCLUSION

The SAM set forth herein, especially as they relate to attorney-client privileged communications and family contact, are reasonably necessary to prevent the inmate from committing, soliciting, or conspiring to commit additional criminal activity. Moreover, these measures are the least restrictive that can be tolerated in light of the ability of this inmate to aid, knowingly or inadvertently, in plans that create a substantial risk that the inmate's communications or contacts with persons could result in death or serious bodily injury to

[8] See Consular Notification and Access, Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them, DOS. The DOS contact is the Consular Notification and Outreach Division, Office of Policy Coordination and Public Affairs, DOS, telephone (202) 485-7703 or http://www.travel.state.gov/law/consular/consular_753.html.

persons.

With respect to telephone privileges, the SAM are reasonably necessary because of the high probability of calls to others to arrange, inspire, or incite terrorist or criminal activities.

With respect to mail privileges, the SAM are necessary to prevent the inmate from receiving or passing along critically timed messages. Accordingly, I have weighed the inmate's interest in the timely receipt and/or submission of mail, with the possible danger the contents of the mail may pose to others. I have determined that delaying mail delivery to allow authorized personnel to examine a copy of the mail is the least restrictive means available to ensure that the mail is not being used to deliver requests for, or to assist in, violent threats, and/or criminal acts against government witnesses or others.

The SAM's prohibition of contact with the media is reasonably necessary. Communication with the media could pose a substantial risk to public safety if the inmate advocates terrorist, criminal, and/or violent offenses, or if he makes statements designed to incite such acts. Based upon the inmate's past behavior, I believe that it would be unwise to wait until after the inmate solicits or attempts to arrange a violent or terrorist act to justify such media restrictions.

The SAM's limitations on access to mass communications are reasonably necessary to prevent the inmate from receiving and acting upon critically timed messages. Such messages may be placed in advertisements or communicated through other means, such as television and/or radio. I believe that limiting and/or delaying media access may interrupt communication patterns the inmate may develop with the outside world, and ensure that the media is not used to communicate information that furthers terrorist, violent, and/or criminal activities.

SAM CONTACT INFORMATION

Any questions that you or your staff may have about this memorandum or the SAM directed herein should be directed to the Office of Enforcement Operations, Criminal Division, U.S. Department of Justice, 1301 New York Avenue, N.W., JCK Building, Room 1200, Washington, D.C. 20530-0001; telephone (202) 514-6809; and facsimile (202) 616-8256.