

TM:GMP/ANL/HDM
F.#2009R01065/OCDETF# NY-NYE-616

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

- against -

09-CR-466 (BMC) (S-4)

JOAQUIN ARCHIVALDO GUZMAN LOERA,
also known as “El Chapo,” “El Rapido,”
“Chapo Guzman,” “Shorty,” “El Senor,”
“El Jefe,” “Nana,” “Apa,” “Papa,” “Inge”
and “El Viejo,”

Defendant.

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MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT’S MOTION TO VACATE OR
MODIFY SPECIAL ADMINISTRATIVE MEASURES

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PRELIMINARY STATEMENT

The government respectfully submits this memorandum of law in opposition to the defendant Joaquin Archivaldo Guzman Loera's (the "defendant" or "Guzman") Motion to Vacate or, in the Alternative, Modify Special Administrative Measures ("SAMs") dated March 13, 2017 ("Def. Br."). (See Dkt. No. 50). The defendant argues that the SAMs should be vacated or modified on the grounds that the SAMs, as applied, do not serve their stated purpose, are inhumane, and violate the defendant's constitutional rights under the First, Fifth and Sixth Amendments. As set forth below, the defendant's arguments are without merit. The Court should deny the motion and uphold the SAMs.

As an initial matter, the Court should reject these claims on jurisdictional grounds because the defendant has failed to exhaust his administrative remedies. Furthermore, the defendant's claims are unpersuasive because the SAMs comply with 28 C.F.R. § 501.3 and do not infringe upon any of the defendant's constitutional rights. Indeed, if there were ever a case warranting SAMs, it is this one. The defendant was the leader of the notoriously violent Sinaloa Cartel (the "Cartel"), the largest drug cartel in the world; has escaped twice from maximum-security prisons; has used corruption as a means to operate his organization both while in and out of custody; and has employed violence, kidnapping and torture through third parties to silence witnesses. There is a substantial risk that the defendant's communications or contacts with persons associated with the Cartel and certain other third parties could result in death or serious bodily injury to persons, including potential witnesses in this case.

BACKGROUND

I. The Charged Offenses

On May 11, 2016, a grand jury sitting in the Eastern District of New York returned the Fourth Superseding Indictment (the “Indictment”) in this case. The Indictment, which spans over two-and-a-half decades of Guzman’s criminal conduct, charges Guzman in Count One with leading a Continuing Criminal Enterprise (“CCE”), in violation of Title 21, United States Code, Sections 848(a), 848(b) and 848(c), for his role as the leader of the Sinaloa Cartel. Count Two charges Guzman with participating in an international conspiracy to manufacture and distribute cocaine, heroin, methamphetamine and marijuana, knowing and intending that the narcotics would be illegally imported into the United States, in violation of Title 21, United States Code, Sections 960(b)(1)(A), 960(b)(1)(B)(ii), 960(b)(1)(G), 960(b)(1)(H) and 963. Counts Three and Four charge Guzman with being involved in cocaine importation and distribution conspiracies, in violation of Title 21, United States Code, Sections 960(b)(1)(B)(ii) and 963, and Title 21, United States Code, Sections 846 and 841(b)(1)(A)(ii)(II), respectively.

The Indictment also charges Guzman in Counts Five through Fifteen with specific instances of international cocaine distribution, knowing and intending that the narcotics would be illegally imported into the United States, in violation of Title 21, United States Code, Sections 959(a), 959(c), 960(a)(3) and 960(b)(1)(B)(ii). Count Sixteen charges Guzman with the unlawful use of one or more firearms in furtherance of his drug trafficking crimes, in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i), 924(c)(1)(A)(ii),

924(c)(1)(A)(iii) and 924(c)(1)(B)(ii). Finally, Guzman is charged in Count Seventeen with participating in a money laundering conspiracy, in violation of Title 18, United States Code, Section 1956(h). The Indictment provides Guzman with notice of criminal forfeiture related to all charged counts in the amount of \$14 billion, which represents an approximation of the illegal proceeds of his narcotics trafficking activities.

If convicted of Count One alone, Guzman faces a mandatory minimum sentence of life imprisonment.

II. Procedural History and SAMs Implementation

On January 19, 2017, Mexico extradited the defendant to the United States and Magistrate Judge Orenstein arraigned the defendant the next day. At arraignment, Magistrate Judge Orenstein entered a permanent order of detention and since that time, the defendant has been incarcerated at the Metropolitan Correctional Center (“MCC”) in New York, New York. On February 3, 2017, the Court held the first status conference in the case and designated the case as complex for Speedy Trial purposes. The next status conference is May 5, 2017.

On February 3, 2017, after the status conference in this case, the Attorney General approved the imposition of SAMs, pursuant to 28 C.F.R. § 501.3, based on the substantial risk that the defendant’s communications or contacts with people inside or outside of the prison could result in death or serious bodily injury, or substantial damage to property that would entail the risk of death or serious bodily injury. (See Def. Br., Ex. A). The SAMs are reasonably necessary to prevent the defendant from committing, soliciting or conspiring to commit additional criminal activity. (See id. at 16). The SAMs mitigate this risk of criminal

activity by restricting the defendant's access to the mail, the media, the telephone and visitors. In general, the SAMs limit contacts and communications between the defendant and other persons based upon a determination that such communications or contacts could result in death or serious bodily injury to others. (See Def. Br., Ex. A at 16-17).

Notwithstanding the limits regarding third-party contacts, the SAMs clearly permit counsel and precleared staff, who have signed affirmations, to communicate with the defendant in a variety of ways to prepare his defense. (See id. at 6, ¶ 2c (“Attorney/Client Privileged Visits”); id. at 6, ¶ 2e (“Unaccompanied Attorney’s Precleared Paralegal(s) May Meet With Client”); id. at 7, ¶ 2f (“Simultaneous Multiple Legal Visitors”); id. at 7, ¶ 2g (“Legally Privileged Telephone Calls”); id. at 8, ¶ 2h (“Documents Provided by Attorney to Inmate”); id. at 10, ¶ 2i (“Legal Mail”)). By signing the affirmation, counsel and counsel’s staff agree not to forward third-party messages to or from the defendant. (See id. at 5, ¶ 2a). Notwithstanding that limitation, the SAMs restrictions provide that counsel for the defendant “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.” (See id. at 6, ¶ 2d.).¹

¹ Although under certain extreme circumstances the monitoring of attorney-client communications is permissible pursuant to 28 C.F.R. § 501.3(d), the SAMs at issue do not provide for any such monitoring.

On February 9, 2017, the Attorney General issued an addendum to the SAMs, which allows for interpreters who have been precleared to meet with the defendant. (See February 9, 2017 Addendum to SAMS, Ex. A).

III. The SAMs Are Necessary Because the Defendant Has Previously Used Third Parties to Silence Witnesses and Escape from Prison

As detailed in the government's prior filings,² and in the SAMs order itself (see Def. Br., Ex. A), the defendant has a demonstrated history of using third parties to silence cooperating witnesses, maintain control of the Cartel while in custody and facilitate his escapes from prison. Namely, the defendant has had third parties, such as his assassins or "sicarios," commit countless acts of violence against individuals deemed to be a threat against the Cartel, specifically, witnesses who may be providing information about the Cartel. (See Gov't Pretrial Det. Mem., Dkt. No. 17, at 5). Further, the defendant has used third parties, such as family members, attorneys and others to enable his control over the Cartel while in custody, as well as to assist in his escape from these prison facilities.

The government anticipates that at trial, cooperating witnesses will testify about the defendant's prolific use of such violence. Specifically, cooperating witnesses will testify about orders the defendant personally gave to these sicarios to murder persons suspected of operating against his and the Cartel's interests. For example, according to cooperating witnesses, Guzman, along with investors in drug shipments affiliated with the Cartel, ordered the murder of Julio Beltran, a narcotics trafficker who they believed was engaging in cocaine

² (See Gov't Pretrial Det. Mem., Dkt. No. 17; Gov't Mot. for Protective Order, Dkt. No. 28; Gov't Ex Parte Submissions, Dkt. Nos. 31 & 44).

transactions behind their back. Assassins gunned down Beltran in the streets of Culiacan, using so many rounds of ammunition that Beltran's head was almost completely separated from his body. (See Gov't Pretrial Det. Mem., Dkt. No. 17, at 20). This is but one example of the defendant's use of brutal force by his sicarios. (See Gov't Pretrial Det. Mem., Dkt. No. 17, at 9). Other attempts by the defendant and the Cartel to kill persons whom they deemed threats are detailed in the government's second ex parte submission to the Court. (See Gov't Ex Parte Filing, dated February 24, 2017 ("Second Ex Parte Submission"), Dkt. No. 44, at 2-3).

Likewise, the defendant has used third parties both to facilitate his control over the Cartel while incarcerated and to plan his escapes from Mexican prisons. (See Gov't Pretrial Det. Mem., Dkt. No. 17, at 5, 10-11). The defendant was incarcerated on three different occasions in Mexico, from 1993 to 2001, from February 2014 to July 2015 and, most recently, from January 2016 to January 2017. While incarcerated, the defendant continued to lead the Cartel. (Id.) In its ex parte filings with the Court, the government provided concrete examples of the defendant conducting criminal activities from a maximum-security facility in Mexico through his various family members, defense attorneys and others. (See Gov't Ex Parte Filing, dated February 2, 2017 ("First Ex Parte Submission"), Dkt No. 31; Second Ex Parte Submission, Dkt. No. 44). While incarcerated from 1993 to 2001, the defendant continued to build his violent, multinational and multibillion-dollar drug trafficking empire and continued to export thousands of kilograms of cocaine, heroin, methamphetamine and marijuana into the United States. (Gov't Pretrial Det. Mem., Dkt. No. 17, at 5). He escaped from prison in 2001, purportedly while hiding in a laundry cart. After his second arrest in

February 2014, the defendant continued to be involved in the Cartel, despite being incarcerated at the maximum security Altiplano Prison in Mexico. (Id. at 11) He escaped from the prison through a mile-long tunnel in part with the aid of corrupt prison workers. (See id.) Indeed, as detailed in the government's Second Ex Parte Submission, throughout his criminal career, the defendant has relied upon foreign professionals, such as attorneys, to obstruct law enforcement investigations and to aid his crimes. The defendant has also used corrupt foreign politicians and law enforcement officers to further his crimes in multiple different countries. (See Gov't Pretrial Det. Mem., Dkt. No. 17, at 17).

Recently, in granting the government's motion for a protective order, the Court, based on the government's prior public and ex parte filings, acknowledged the defendant's use of third parties to further his criminal activity. (See March 21, 2017 Order, Dkt. No. 51 ("Given defendant's alleged history of using individuals, including professional individuals, to further his alleged enterprise, the risk presented by permitting foreign nationals, whether attorneys, investigators, or others who could be members or associates of the Sinaloa Cartel, to join the Defense Counsel's Team without appropriate vetting is significant.")).

In light of the defendant's prior use of third parties to (1) carry out acts of violence against cooperating witnesses, (2) facilitate control over the Cartel while incarcerated, and (3) escape from maximum security prison facilities in Mexico, the government sought the implementation of the SAMs pursuant to 28 C.F.R. § 501.3. Considering the defendant's leadership status, his demonstrated ability to commit violence against any threat to him and his organization, and his history of escapes from maximum security prisons, it is clear that, absent

the SAMs, the defendant's access to unrestricted communications or unmonitored contacts with other persons would pose a substantial risk of death or serious injury to the community.

On March 13, 2017, the defendant filed a motion to vacate the SAMs. (See Def. Br.). On March 15, 2017, the Court ordered the government to respond to this motion by March 21, 2017.

IV. Implementation of the SAMs

Since the government implemented the SAMs, it has made every effort to accommodate defense counsel meetings with the defendant. To date, there have been over thirty individuals approved to visit the defendant (five attorneys from the Federal Defenders, two Curcio counsel, fifteen private defense counsel, as well as nine paralegals, investigators, and interpreters). Indeed, these individuals have visited with the defendant extensively. Since the defendant's arrival in the United States on January 19, 2017, until March 17, 2017, the defendant had visitors on every single day but five. These visits have lasted for numerous hours, with the near-daily visits totaling approximately five hours per day. For example, on March 7, 2017, the defendant met with cleared persons from the legal team from 12:30pm to 2:30pm, and then again from 5:30pm to 8:00pm. Just three days later, on March 10, 2017, the defendant met with counsel and defense team members from 1:20pm to 3:30pm, and then other counsel and defense team members from 5:30pm to 8:00pm. Three days later, on March 13, 2017, the defendant met with counsel from 12:30pm to 3:00pm, and then met with other defense team members again from 5:30pm to 8:00pm. These visits have averaged over 21 hours per week.

MCC officials have reported that they have had to revise their attorney visitation policy in the defendant's unit to allow for other inmates in that unit to meet with their attorneys as the defendant's meetings with his legal team are so lengthy and frequent. Further, on at least one occasion, an approved private defense attorney could not get in to see the defendant because attorneys from the Federal Defenders were meeting with the defendant for a lengthy period. Additionally, on many of these occasions, MCC officials have noted that the defendant has met exclusively with paralegals from the Federal Defenders in the evening hours. These visits last for several hours (generally from 5pm to 8pm), and during these meetings, the paralegals appear to be teaching the defendant English, as well as reading to the defendant in Spanish. MCC officials also observed the paralegals reading newspapers to the defendant.³

Counsel for the defendant have requested access for only one family member, Emma Coronel Aispuro ("Ms. Coronel"), despite the fact that the defendant has numerous immediate family members, at least one of whom lives in California (his adult daughter),⁴ and another who has sought to retain counsel for the defendant (his sister). The government has

³ An MCC official made these conclusions based on observing a Federal Defenders' paralegal holding up a piece of paper for the defendant to see, and then seeing the paralegal mouth a word, which Guzman appeared to repeat. The MCC official also observed the paralegal with copies of Spanish-language newspapers, which the paralegal read to Guzman. These observations were made as part of the MCC official's need to maintain visual contact for safety purposes. At no time did this MCC official or any MCC staff listen to any of the defendant's communications with his defense team.

⁴ See Californian, businesswoman, 'narco daughter': El Chapo's American daughter, The Guardian (March 4, 2016), available at <https://www.theguardian.com/world/2016/mar/04/el-chapo-daughter-joaquin-guzman-california> (last visited on March 19, 2017).

denied Ms. Coronel access to the defendant given the serious security issues detailed in the government's ex parte filings. (See Dkt. Nos. 31 & 44). The government communicated the decision to deny access to Ms. Coronel to defense counsel on February 24, 2017. Notwithstanding this communication, Ms. Coronel and another Mexican attorney arrived at the MCC on February 26, 2017, presented their Mexican passports and requested information about gaining social and legal visits to the defendant.⁵ The MCC denied this request.

The government is cognizant of the defendant's requests to visit with family members and, as early as February 3, 2017, the government discussed facilitating a visit between the defendant and his minor children with defense counsel. To date, defense counsel have not made a request for any other family member to visit the defendant, other than Ms. Coronel.

The defendant also asserts a number of specific claims regarding his conditions of confinement, such as the size of his cell, the lack of a window, eating alone, no daylight in his cell, lack of access to a clock and erratic air-conditioning. (See Def. Br. 7). As an initial matter, a number of these claims are not accurate. For example, the defendant's cell (the largest in the unit) has a window with frosted glass that allows daylight to come into his cell. (See Def. Br. at 7). Further, as the defendant acknowledges, he has a radio in his cell, and has

⁵ This is particularly notable in light of the fact that Ms. Coronel has contacted at least three of the private attorneys who have signed SAMs affirmations and had access to the defendant. One of these attorneys assisted Ms. Coronel in filling out the required paperwork, and the Federal Defenders continuously have requested updates regarding the status of Ms. Coronel's visitation privileges. Nonetheless, Ms. Coronel attempted to bypass the system in place and attempted to gain access to the defendant.

access to two pieces of exercise equipment. The defendant is further aware that he has the ability to make requests regarding his housing conditions. Since his arrival in the United States, the defendant has filed eleven Requests for Administrative Remedies, also known as BOP-9's, with the MCC through the Administrative Remedy Program. Of those requests, the Bureau of Prisons ("BOP") has granted or partially granted seven requests. For instance, the defendant complained that the tap water at the MCC was irritating his throat and requested that the BOP allow him to buy bottled water from the commissary. The BOP granted that request. The defendant made mention of the lack of Spanish-speaking staff working in his unit and that the language barrier made it difficult for him to order items from the commissary. The BOP provided the defendant a commissary list in Spanish. The BOP also informed the defendant that there are typically Spanish-speaking staff available, and that he should reach out to his unit lieutenant who could obtain the services of a Spanish-speaking staff member. The BOP also allowed the defendant to purchase a clock from the commissary.

The MCC denied four requests due to security reasons, and informed the defendant that he can appeal to the Regional Director. To date, the defendant has not filed any appeals.

While the defendant complains about his prison conditions, one of his own Mexican attorneys, Silvia Delgado, told the press that the defendant's treatment in the United States has been far better than it was in Mexico, to the point that the defendant's health is

improving.⁶ Additionally, contrary to his claims of auditory hallucinations (See Def. Br. at 8), on March 14, 2017, a visit of the defendant by an MCC staff psychologist revealed that the defendant had merely been hearing sound from a radio that a staff member in the defendant's MCC unit had been playing. The defendant advised MCC staff that he would inform his attorneys of this fact.

ARGUMENT

I. The Court Lacks Jurisdiction to Entertain Defendant's Motion Because He Has Failed to Exhaust His Administrative Remedies as Required by the SAMs

Prior to bringing a motion to vacate an order imposing SAMs in federal court, a defendant must exhaust his administrative remedies within the BOP system. The authority to impose SAMs stems from the Attorney General's authority over the federal penal system, which the Attorney General has delegated to the BOP. See, e.g., 18 U.S.C. §§ 3621, 4401(b), 4042. The BOP establishes the conditions of confinement for all persons in its custody pursuant to BOP regulations and policies. The regulations govern inmate communications and contacts, among other conditions of confinement. The severity of the conditions of confinement depends upon where the prisoner is housed, as well as the type of crime for which an individual

⁶ See Mexican lawyer: Prison in U.S. far better for "El Chapo" than Mexico, JammedUp (February 13, 2017), available at <http://news.jammedup.com/2017/02/13/el-chapo-lawyer-drug-kingpin-didnt-know-hed-be-sent-to-u-s/> (last visited on March 19, 2017); One of Joaquin "El Chapo" Guzman's Attorneys Speaks about His Extradition and Current Situation, RGV proud (February 10, 2017), available at <http://www.rgvproud.com/news/local-news/one-of-joaquin-el-chapo-guzmans-attorneys-speaks-about-his-extradition-and-current-situation/654748848> (last visited on March 19, 2017).

is incarcerated. The BOP may impose SAMs based on violence or terrorism-based concerns pursuant to 28 C.F.R. § 501.3.

The Prison Litigation Reform Act (“PLRA”) expressly states that, “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). The Supreme Court has held that this jurisdictional requirement, known as “exhaustion,” is mandatory. Porter v. Nussle, 534 U.S. 516, 524 (2002); see also Booth v. Churner, 532 U.S. 731, 739 (2001). The exhaustion of remedies requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes. Porter, 534 U.S. at 532. The Supreme Court noted that Congress described the cases covered by the exhaustion requirement as “action[s] . . . brought with respect to prison conditions.” Id. at 525 (alteration in original). The Court reasoned that Congress enacted the broad reaching exhaustion requirement “to reduce the quantity and improve the quality of prisoner suits,” noting that this would give corrections officials “time and opportunity to address complaints internally before allowing the initiation of a federal case.” Id.; accord United States v. Al-Marri, 239 F. Supp. 2d 366, 367-68 (S.D.N.Y. 2002) (“The Supreme Court’s decision in Porter . . . makes clear that courts should not intervene in matters regarding prison conditions until corrections officials had had the time and opportunity to address such complaints internally.”).

Here, the defendant has only taken preliminary steps to exercise his rights under the Administrative Remedy Program. See supra at 11-12. While he has initiated his

administrative remedies by filing multiple Requests for Administrative Remedies, he has not yet exhausted the process. The defendant's list of challenges to a number of the specific SAMs restrictions are precisely the kind of claims contemplated by the Administrative Remedy Program, and hence, as other courts have found, they are more effectively and efficiently addressed in the first instance by the BOP. See, e.g., Al-Marri, 239 F. Supp. 2d at 367. The exhaustion of administrative remedies is not a mere procedural hoop through which a defendant must jump. For example, the defendant requested that the BOP add bottled water to the commissary list and that the BOP translate the commissary list into Spanish. The BOP fulfilled both requests. As such, the administrative process established by the Administrative Remedy Program serves as a meaningful mechanism by which the BOP may implement potential modifications to, or clarifications of, SAMs restrictions to resolve, clarify or limit conflicts.

The Second Circuit has held that a prisoner must exhaust his administrative remedies before challenging SAMs in federal court. See United States v. Yousef, 327 F.3d 56, 165 (2d Cir. 2003) (“Yousef must exhaust his administrative remedies under the Bureau of Prisons Administrative Remedy Program with regard to whatever special administrative measures are imposed on him.”). Numerous courts, including the Supreme Court, have upheld the requirement for an inmate to exhaust administrative remedies under this statute. See Porter, 534 U.S. 516; Booth, 532 U.S. 731; accord United States v. Ali, 528 F.3d 210, 244 (4th Cir. 2008) (“The defendant must exhaust his administrative remedies before challenging the SAMs in federal court.”); Yousef v. Reno, 254 F.3d 1214, 1221-22 (10th Cir. 2001).

At least one court in this district has held that a defendant could challenge SAMs directly with the federal court without first exhausting administrative remedies. See United States v. Mohamed, 103 F. Supp. 3d 281, 285-87 (E.D.N.Y. 2015) (Kuntz, J.); see also United States v. Hashmi, 621 F. Supp. 2d 76, 78, 86 (S.D.N.Y. 2008) (finding the court had jurisdiction without requiring the defendant to exhaust administrative remedies). Mohamed distinguished the Supreme Court and Second Circuit precedent discussed above because the defendants in those cases were not in pretrial detention at the time they challenged their conditions under SAMs. In United States v. Khan, 540 F. Supp. 2d 344, 349 (E.D.N.Y. 2007) (Irizarry, CJ.), however, another court in this district concluded that the Supreme Court has drawn no such pretrial/post-trial distinction in determining when a prisoner must exhaust his or her administrative remedies before challenging his or her conditions of confinement in federal court.

Therefore, based on the holdings of the Supreme Court and the Second Circuit, as well as the plain language of the PLRA, the defendant must first seek all redress available from the BOP before bringing this challenge to the Court. The Court should dismiss the defendant's motion without prejudice to allow for the exhaustion of administrative remedies.

II. The SAMs Do Not Violate the Defendant's Constitutional Rights

The defendant claims that the SAMs infringe upon his constitutional rights of due process and hinder his ability to prepare his own defense. (See Def. Br. at 11-15). Specifically, the defendant claims that the SAMs are punitive and violate his First, Fifth and Sixth Amendment rights. (See id.) The Second Circuit has rejected nearly identical claims

in the past. See, e.g., United States v. El-Hage, 213 F.3d 74 (2d Cir. 2000). The SAMs here are warranted because they are reasonably related to the government's interest in preventing the defendant from contacting persons associated with the Sinaloa Cartel, and certain other third parties, who could cause death or serious bodily injury to potential witnesses and their families. In addition, no reasonable alternative means exist. Accordingly, the SAMs do not infringe on the defendant's constitutional rights. As such, the Court should reject the defendant's claims.

A. SAMs Are Constitutional and Valid Under Established Law

It is well settled that restrictive conditions of pretrial detention may pass constitutional muster so long as they are administrative rather than punitive in nature. See United States v. Salerno, 481 U.S. 739, 746-51 (1987); Bell v. Wolfish, 441 U.S. 520, 535-40 (1979) Basciano v. Lindsay, 530 F. Supp. 2d 435, 445 (E.D.N.Y. 2008). Accordingly, “[a] court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose.” Bell, 441 U.S. at 538; Basciano, 530 F. Supp. 2d at 444-45; see Turner v. Safley, 482 U.S. 78, 89 (1987) (upholding regulations of inmate-to-inmate communications as reasonably related to legitimate security concerns); El-Hage, 213 F.3d at 81 (upholding similar SAMs restrictions for pretrial detainee as constitutional); United States v. Felipe, 148 F.3d 101, 110 (2d Cir. 1998) (upholding restrictions similar to SAMs as reasonable and finding no due process violation); United States v. Sattar, 272 F. Supp. 2d 348, 369 (S.D.N.Y. 2003) (upholding requirement of affirmation from an attorney as a reasonable measure for effectuating SAMs restrictions). In the absence of a detention official's express intent to punish, the court's determination “generally turns on

‘whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].’” Basciano, 530 F. Supp. 2d at 445 (quoting Bell, 441 U.S. at 538-39). Thus, courts have found that a pretrial condition “will not amount to punishment if it is reasonably related to a legitimate governmental objective, but will if it is arbitrary or purposeless.” Id. (quoting Bell, 441 U.S. at 539) (quotations omitted).

The Second Circuit, in reviewing whether restrictive pretrial conditions violate a defendant’s due process rights, has applied the test established in Turner. In Turner, the Supreme Court identified four factors for evaluating whether a regulation relating to confinement is reasonable, specifically, whether: (1) a valid, rational connection exists between the regulation and the purported government interest; (2) alternative means of exercising the constitutional right at issue remain available; (3) accommodation of the right asserted by the prisoner will have a significant impact on the prisoner’s fellow inmates, prison staff or prison resources; and (4) there is an absence of ready alternatives to the regulation. Turner, 482 U.S. at 89-91; see also El-Hage, 213 F.3d at 81 (recognizing four-factor test in Turner as the standard by which the SAMs restrictions should be reviewed). The Court in Turner made clear that the last factor is not a “least restrictive alternatives” test: “prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant’s constitutional complaint.” Id. at 90-91. But if an inmate claimant can point to an alternative that fully accommodates the prisoner’s rights at de minimis cost to valid penological interests,

a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.” Id. at 91.

The Turner Court further recognized that courts must afford prison administrators deference in managing detention facilities as “courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.” Turner, 482 U.S. at 84 (quoting Procunier v. Martinez, 416 U.S. 396, 405 (1974)). Similarly, the Supreme Court has cautioned that, when determining whether a pretrial condition is reasonably related to a legitimate governmental objective, a court must be mindful that “such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.” Basciano, 530 F. Supp. 2d at 445 (quoting Bell, 441 U.S. at 540 n.23, 547). This deference can have particular significance when the restrictions at issue have been implemented for security purposes. See, e.g., Thornburgh v. Abbott, 490 U.S. 401, 407 (1989).

An analysis of the four factors in this case demonstrates that the SAMs restrictions are reasonable and neither impinge on the defendant’s due process rights nor prejudice his ability to prepare his own defense.

B. The SAMs Are Reasonably Related to a Legitimate Penological Interest

As detailed above, pursuant to 28 C.F.R. § 501.3, the Attorney General may direct the BOP to implement SAMs that are reasonably necessary to protect persons against the risk of death or serious bodily injury pursuant to the Attorney General's finding that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons. In this case, the Attorney General directed the BOP to implement SAMs with respect to the defendant because he found that there was ample evidence demonstrating a substantial risk that the defendant's 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.

As described above, and in the government's prior ex parte submissions, the defendant has an established history of acting through third parties to operate his vast, violent drug cartel, silence potential witnesses and orchestrate not one, but two elaborate escapes from prison. Accordingly, based upon the Attorney General's findings in this case and the facts set forth above, there is a legitimate governmental interest in limiting the defendant's contacts and communications. See, e.g., Basciano, 530 F. Supp. 2d at 446 (finding that the government's purpose of preventing harm to those whom the defendant "may wish to harm and of inhibiting his ability to oversee the operations of the Bonanno crime family, widely known for its propensity to order and commit violent acts, are legitimate purposes") (citing El-Hage, 213 F.3d at 81-82).

The defendant's confinement conditions are reasonably related to the purpose of inhibiting his ability to harm others outside and inside prison. Specifically, the challenged communication restrictions are reasonably necessary to ensure that others do not pass on, whether intentionally or inadvertently, forbidden messages from the defendant to third parties. The courts have long recognized this concern as a legitimate justification for SAMs under section 501.3(a). See Turner, 482 U.S. at 93 ("In any event, prisoners could easily write in jargon or codes to prevent detection of their real messages."); United States v. Hammoud, 381 F.3d 316, 334 (4th Cir. 2004) ("A conversation that seems innocuous on one day may later turn out to be of great significance, particularly if the individuals are talking in code."); United States v. Johnson, 223 F.3d 665, 673 (7th Cir. 2000) ("And we know that anyone who has access to a telephone or is permitted to receive visitors may be able to transmit a lethal message in code."); United States v. Salameh, 152 F.3d 88, 108 (2d Cir. 1998) ("Because Ajaj was in jail and his telephone calls were monitored, Ajaj and Yousef spoke in code when discussing the bomb plot."); Basciano, 530 F. Supp. 2d at 440, 446-47 (upholding SAMs where defendant demonstrated ability to pass messages in coded language to order violence); United States v. Ali, 396 F.Supp.2d 703, 709 (E.D.Va. 2005) (taking note that "al-Qaeda trains its followers to use a variety of means to communicate with their confederates from prison").

For example, the argument that the SAMs restrict defense counsel from communicating messages they perceive to be innocuous on the defendant's behalf is rebutted by the prospect that those seemingly innocuous messages are, in fact, coded communications, whose dangerous intent will be clear to the recipient if not the messenger.

Notably, the Second Circuit has affirmed similar conditions of confinement where a defendant had limited contact with prison employees, defense counsel and five approved individuals even where, unlike here, the defendant was not alleged to have made any illegal communications from prison, because such restrictions served the regulatory purpose of preventing the defendant from communicating with his unconfined co-conspirators. El-Hage, 213 F.3d at 82. Here, the SAMs Authorization Memorandum provides ample evidence of the defendant's leadership of the Cartel and his proven history of running his violent organization from prison, using co-conspirators to harm and silence potential witnesses and his engineering of two complex prison escapes.⁷ This more than demonstrates a clear rational relationship between the challenged restrictions and the legitimate governmental purpose of safeguarding the public and preventing acts that could lead to death or serious bodily injury. In short, the SAMs are reasonably necessary to address legitimate and serious concerns about the defendant's engaging in further criminal activity, including the potential use of violence.

C. The Other *Turner* Factors Support Maintaining SAMs Restrictions

The other Turner factors also weigh against vacating the SAMs and placing the defendant in general population. The BOP can address the defendant's rights to counsel and humane treatment without the Court vacating the SAMs. Indeed, as noted above, the BOP has

⁷ In his brief, the defendant suggests that the risk of his escape no longer exists because the large-scale corruption of prison officials in Mexico is not a factor in the United States. The defendant's argument ignores the fact that it was the defendant, and his co-conspirators outside of the jail, who orchestrated the corruption payments to the Mexican prison officials; and although U.S. prisons do not suffer the same level of corruption as Mexican prisons, corruption of one or more prison officials could facilitate the defendant's escape.

already taken steps toward addressing some of the concerns the defendant raised in his motion, by ensuring that a Spanish-speaking staff member is available to communicate with the defendant. Further, the government agrees that the Court may modify the SAMs for the limited purpose of communicating the defendant's desire to retain particular counsel and the logistics of obtaining funds to do so, as discussed below.

By contrast, releasing the defendant, with his well-documented history of violence, into the general population, would put other inmates and prison guards at risk and would strain prison resources beyond measure. In light of the defendant's notoriety and role as the leader of the most powerful drug cartel in the world, the resources needed to monitor the defendant's communications with other inmates who may try to curry favor with the defendant by performing acts of violence on his behalf, or aiding in his escape,⁸ would be impossible for the BOP to provide. See Basicano, 530 F. Supp. at 449 (acknowledging that attempting to monitor defendant's communications in general population would have significant impact on prison resources and thus weigh in favor of maintaining restrictive conditions). There are no

⁸ The risk posed by the defendant manipulating other inmates to do his bidding if BOP placed him in general population is demonstrated by news reports that, when the defendant arrived at the MCC, inmates greeted him by chanting his name. See Female Inmates Welcome El Chapo by Wildly Chanting his Name (January 19, 2017), available at <http://nypost.com/2017/01/19/female-inmates-welcome-el-chapo-by-wildly-chanting-his-name/> (last visited on March 19, 2017). Moreover, multiple news outlets reported about a YouTube video depicting several California maximum-security inmates who pledged their allegiance to the defendant and promised to break him out of prison if they were placed in the same facility. See Video shows California prisoners offering protection and escape help to drug lord 'El Chapo' (January 26, 2017), available at <http://www.latimes.com/local/lanow/la-me-ln-california-prisoners-el-chapo-escape-protection-video-20170126-story.html> (last visited on March 19, 2017); <http://www.nydailynews.com/news/world/california-inmates-vow-break-el-chapo-prison-article-1.2957434> (last visited on March 19, 2017).

alternative means to address the penological concerns presented by the incarceration of this this uniquely powerful and violent defendant.

III. The SAMs Do Not Violate the Defendant's Sixth Amendment Right to Counsel

The defendant claims that the SAMs restrictions violate his Sixth Amendment right to counsel in three ways: (1) the SAMs attorney-client provisions are unauthorized by regulation because they are not supported by a "reasonable suspicion" that the defendant "may use communications with attorneys or their agents to further or facilitate acts of terrorism;" (2) the parameters placed on attorney-client communications interfere with the effective assistance of counsel; and (3) as applied, the SAMs restrictions prevent the defendant from retaining counsel of his choice. The government agrees that the Court may modify the SAMs to allow defense counsel and/or private counsel, who have been precleared to meet with the defendant, to send prescreened communications to the defendant's family members for the limited purpose of communicating the defendant's desire to retain particular counsel and the logistics of obtaining funds to do so. All of the defendant's remaining arguments, however, should be rejected.

A. The Attorney-Client Provisions of the SAMs Are Authorized Because They Are Reasonably Related to a Governmental Objective

There is a valid, rational connection between the SAMs restrictions pertaining to attorney-client communications and the government's interest in limiting the defendant's contacts and communications. As noted above, the SAMs restrictions are both reasonable and necessary, and do not, contrary to the defendant's claim, impermissibly restrict the attorney-client relationship. The government did not impose the SAMs restrictions because of

any actions by the defendant's counsel giving rise to "reasonable suspicion." The reasonable suspicion standard only applies to "the monitoring or review of communications between that inmate and attorneys or attorneys' agents who are traditionally covered by the attorney-client privilege, for the purpose of deterring future acts that could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons." See 28 C.F.R. 501.3(d). Here, the SAMs restrictions do not call for the monitoring or review of attorney-client communications and are certainly not intended to imply that the government expects defense counsel to engage intentionally in any wrongdoing in the future. But such wrongdoing is not a prerequisite to imposition of SAMs restrictions. See Hashmi, 621 F. Supp. 2d at 78, 86 (holding that SAMs restrictions that "place certain limitations on communications between the Defendant and his attorneys" did not violate defendant's right to counsel and were valid because they were "reasonably related to legitimate penological objectives"). In fact, compliance with SAMs restrictions is highly dependent upon the honesty and integrity of defense counsel and their staff, which is not in question here.

As detailed above, the government imposed the SAMs restrictions to prevent dangerous communications between the defendant and third parties by putting all parties on notice of the heightened security concerns relating to communications to and from the defendant, which require extra diligence, particularly when disseminating any such communications. Under the circumstances of this case and because of the security concerns, the imposition of restrictions on the defendant's contacts and communications is reasonable and warranted. See Basciano, 530 F. Supp. 2d at 448 (finding imposition of SAMs "rational

response to the Government’s legitimate purpose” where government offered evidence of defendant’s use of third parties to pass messages from prison to associates regarding affairs of defendant’s criminal organization). Moreover, the affirmation required by the SAMs restrictions for defense counsel and their staff provides a reasonable measure for ensuring that the SAMs restrictions have effect, while permitting the representation to proceed undisturbed. See Hashmi, F. Supp. 2d at 87 (upholding requirement that counsel sign SAMs acknowledgment forms, noting that defense counsel “would do well to avoid the conduct that formed the basis of [another] attorney’s conviction—smuggling messages from her client to co-conspirators, despite acknowledging that SAMS forbade her from doing so”).

B. SAMs Restrictions Do Not Prevent Effective Assistance of Counsel

Arguing that the SAMs thwart the effective assistance of counsel, the defendant contends that (1) the limitations on attorney-client communication are overbroad and vague; (2) they arbitrarily make distinctions between staff members and unduly burden the defense team; and (3) they impose burdensome limits on the defendant’s legal calls. The Court should reject these arguments.

1. The SAMs Guidelines Governing Attorney-Client Communications Are Not Overbroad or Vague

The defendant claims erroneously that the SAMs restrictions on attorney-client communications are overbroad and vague. (See Def. Br. at 16, 19-20, 22). The defendant injects vagueness into the plain language of the restrictions where none exists.

First, the defendant claims that the provision allowing only for attorneys to disseminate the defendant’s communications to third parties is vague because it is unclear

whether defense team members can make use of such communications. (Def. Br. at 16, 19). But this provision plainly concerns only the dissemination of the defendant's communications to third parties, not the use of information derived from the defendant's communications. The provision precludes any member of the defense team, other than the defendant's attorneys, from disseminating communications to third parties; but it does not limit how any member of the defense team may use such communications in the preparation of the defense. (See Def. Br., Ex. A at 6, ¶ 2d (stating that only defendant's attorneys may disseminate contents of defendant's communication to third parties for sole purpose of preparing defense, but that members of defense team other than attorneys may not disseminate such communications)). Thus, under this provision, it is up to the defense attorneys to make the legal determination as to who outside the defense team should have access to the defendant's communications for the purpose of preparing the defense. In that way, the provision ensures that such communications are carefully guarded and only distributed to third parties after appropriate consideration.

Second, the defendant claims that the term "messages" is undefined, but does not explain why the dictionary definition of message—i.e., "a communication in writing, by speech or by signals"—does not supply sufficient clarity. (See Def. Br. at 15, 22); Merriam-Webster Dictionary, Definition of Message, <https://www.merriam-webster.com/dictionary/message> (last visited March 20, 2017). Specifically, the defendant expresses concern that the SAMs prevent counsel from fulfilling its role in informing the defendant's family members about his well-being. Under the plain meaning of the SAMs, defense counsel simply is restricted from communicating a specific verbal, written or recorded message from the defendant, unaltered,

to third parties. Defense counsel, however, is able to share observations about the defendant, such as his health or spirits, to his family and friends, without violating the SAMs. For example, defense counsel is able to share that the defendant is in good health and wishes his family well, without passing on verbatim messages (which may or may not be coded).

Third, the defendant claims that the prohibition against providing the defendant with “inflammatory material” is overbroad and includes barring the defendant from access to discovery or material necessary for investigative purposes. (Def. Br. at 15). There is absolutely nothing in the SAMs restrictions that bar the defendant from reviewing discovery or material necessary for defense investigation. Finally, the SAMs restrictions do not authorize the government to monitor privileged attorney-client communications, and contrary to the defendant’s contention, there is nothing ambiguous about that clause. (See Def. Br., Ex. A, at 5-8). Accordingly, because the SAMs restrictions are clear on their face, the defendant’s claims that they are ambiguous are wrong.

2. The Distinctions Among Defense Team Members Are Not Arbitrary or Unduly Restrictive

The defendant complains that the SAMs restriction that allows paralegals to visit with the defendant alone, while requiring attorneys to accompany investigators is arbitrary. (Def. Br. at 21). Because of the unique security risks the SAMs addresses, this particular provision of the SAMs limits the people who meet alone with the defendant to the core members of the defense team. Considering the near-daily visits between the defendant and the individuals who would qualify as “precleared staff” under the SAMs as well as the length of the visits by those individuals, see supra at 5, it is difficult to discern how this particular

provision of the SAMs has burdened the defendant's Sixth Amendment rights. In any event, if the defense team has a unique need for sending a staff investigator to meet with the defendant alone, without sending a paralegal or an attorney, the government will consider making modifications on a case-by-case basis.

Moreover, the defendant contends that the definition of "precleared staff" is unduly restrictive because it excludes visits from outside defense experts. (Def. Br. at 20). With respect to visits by defense experts, if the expert submits to a background check for preclearance and defense counsel will be present for the visit, defense counsel can request a modification to the SAMs to allow for that defense expert's visit. Again, the government will consider such requests on a case-by-case basis.

3. Legal Calls Are Not Unduly Restricted

In arguing that the SAMs interfere with his Sixth Amendment rights, the defendant points to the SAMs restrictions on legal calls, which require precleared staff members and interpreters to be physically in the same room as the defendant's attorney, and prohibits them from participating by conference call. Def. Br. at 21-22. As proof of the SAMs' restrictiveness, the defendant points to the fact that the MCC has not facilitated any legal calls since the date of his incarceration.

Under Turner, there is an obvious government interest in limiting means by which third parties, who are not precleared, could participate on legal calls, and the restriction is reasonably related to that interest. Section 2(b)(ii) of the SAMs forbids multiple telephone connections between attorneys, precleared staff and the defendant. While those individuals

may be trustworthy, multiple telephone connections increase the risk that a third party, who has not been permitted to communicate with the defendant, could overhear the conversation between the precleared parties—whether it be in-person or electronic. Such a risk is elevated if the precleared individuals participating on the telephone call with the defendant are not all physically present in the same room. Applying the remaining Turner factors, the defendant has not offered any less restrictive means of achieving the goal of preventing leaks resulting from conference calls, and the government need not show that the SAMs are the least restrictive means of meeting this goal. Hashmi, 621 F. Supp. 2d at 87 (citing Turner, 482 U.S. at 90). Thus, the restrictions to legal calls are reasonable under the circumstances.

As to the lack of legal calls between the defendant and defense counsel under the current SAMs, BOP staff has advised that the only legal call that defense counsel has requested to date was denied simply because counsel requested the call on the same day that defense counsel had visited the defendant in person. Legal calls are routinely denied under such circumstances because of limited prison resources. Given the almost daily meetings between the defendant and his attorneys, the SAMs restriction on legal calls has not hindered the defendant's ability to communicate with his counsel.

C. The SAMs with Modification Do Not Interfere with the Defendant's Ability to Retain Counsel

The defendant argues that the SAMs, as applied, impinge upon his right to counsel by restricting his inability to (1) communicate with family via private counsel for the limited purpose of ascertaining and securing the funds necessary to retain counsel and (2) directly communicate with his wife, Ms. Coronel. The government agrees to modify the

SAMs to allow current counsel and private attorneys, who have been precleared by the government to meet with the defendant, to send messages from the defendant that are prescreened by the government to his family for the limited and specific purpose of relaying the defendant's desire to retain private counsel and the information necessary to secure the assets for such representation. As discussed above, given the possibility that the defendant will send coded messages to his family members directing them or Cartel members to harm other persons, the pre-screening requirement for such communications is necessary. Notably, because these communications are from the defendant to his attorneys to third parties, the communications are not privileged. This accommodation therefore is reasonable under the circumstances. While the government believes this limited modification is appropriate here, it continues to object to allowing direct communication between the defendant and Ms. Coronel.

For reasons stated in the government's First and Second Ex Parte Submissions (see Dkt. Nos. 31 and 44, respectively), the Court should not permit the defendant to have direct contact with Ms. Coronel. Even if the Court were to modify the SAMs to allow the defendant to communicate with Ms. Coronel only for the limited purpose of retaining counsel, there is no guarantee that these limited interactions would not thwart the purpose of the SAMs, which is to prevent serious bodily injury or death. As discussed above, even seemingly innocuous statements can be dangerous communications designed to harm individuals outside of prison who may be witnesses or witnesses' family members. See, e.g., Turner, 482 U.S. at 93 (noting that inmate could easily use coded language); Hammoud, 381 F.3d at 334; Johnson, 223 F.3d at 673; Salameh, 152 F.3d at 108. Given the lengthy and close relationship between the

defendant and Ms. Coronel, they may already have a code in place to communicate with each other while the defendant is in custody. Moreover, through multiple in-person meetings or phone calls, they would have the opportunity to develop a code over time. Thus, having a federal agent monitor such visits or phone calls would not sufficiently ensure that the nature of their communications is innocuous and limited to the matter of retaining counsel. For these reasons, direct communication between the defendant and Ms. Coronel could facilitate the transmission of coded messages in a way that prescreened communications from the defendant to his family members would not.

In any event, Ms. Coronel's own actions since the implementation of the SAMs cast doubt on whether she would limit her communications with the defendant to the topic of retaining counsel and securing funding. As noted above, despite the fact that the government had informed defense counsel that it had denied Ms. Coronel permission to visit the defendant, she appeared at the MCC anyway, with a Mexico-based attorney, and demanded to see the defendant. Her flagrant willingness to disregard the SAMs is evident.

While Ms. Coronel may be able to assist the defendant in retaining private counsel, she is by no means the only person available who can assist the defendant in this endeavor. For instance, as noted above, the defendant's sister has reached out to some private counsel about the prospect of representing the defendant. The government has learned that at least one of those private attorneys has in fact visited the defendant. Similarly, as noted above, the defendant has at least one adult child who is a United States citizen. Therefore, the Court

should reject the defendant's specious insistence that Ms. Coronel is the only person who can assist the defendant in retaining counsel and decline to modify the SAMs.⁹

IV. The SAMs Restrictions Are Prisoner-Specific

The defendant claims that the SAMs restrictions are not specific to his circumstances, and thus should be vacated. (Def. Br. at 26-28). But the SAMs restrictions imposed on the defendant specifically address the concerns outlined by the Attorney General in the original memorandum, dated February 3, 2017. (See Def. Br., Ex. A). The defendant has a history of extreme violence that demonstrates that he will stop at nothing to obtain his freedom and to further his own interests. Evidence of the defendant's violent history is overwhelming. As documented in the government's detention memorandum and other court filings, the defendant regularly used torture, murder and kidnapping to maintain control in the ranks of the Cartel, to punish members of rival drug trafficking organizations and to exact revenge on individuals who sought to bring the defendant or other members of the Cartel to justice.

Indeed, in its Second Ex Parte Submission (Dkt. No. 44), the government provided specific instances of murders and attempted murders by the defendant and the Cartel of persons suspected of cooperating with the government as well as evidence of the defendant's

⁹ The Court has already upheld the government's denial of Ms. Coronel's access to the defendant. At the February 3, 2017 status conference, when asked by defense counsel if Ms. Coronel could visit the defendant, the Court stated: "With regard to visitation of the defendant, I am again going to defer to the prison authorities for determining who should be in and who should not. It is an unusual case, and reasons have been given to me on an ex parte basis, which I feel are sufficient to defer to the MCC on that." See Tr. of Feb. 3, 2017 Status Conference at 27:15-19.

efforts to corrupt ongoing investigations into him. Some of these attempted murders occurred while the defendant was incarcerated. As detailed in that submission, the defendant also has a demonstrated history of using his representatives to further his criminal enterprise. For instance, throughout his criminal career, the defendant has relied upon attorneys and family members to obstruct law enforcement investigations and to aid in his crimes. Accordingly, the SAMs restrictions are specifically tailored to address the defendant's extremely serious and dangerous behavior.

The defense attempts to distinguish this case from others on the grounds that the defendant here has not done anything specific since his arrest to warrant SAMs restrictions. (Def. Br. at 16). This argument is unavailing. There is nothing in the SAMs regulations or the applicable laws that suggest that SAMs only may be imposed after a particular defendant causes the very harm that the SAMs are designed to prevent. The reasons that SAMs restrictions were imposed in this case included the defendant's pre-arrest behavior and ability to cause death or injury to others. In a case cited by the defendant, United States v. Tsarnaev, 13-CR-10200-GAO (D. Mass. 2013), the defendant was charged with heinous crimes. Yet other than the crimes themselves, there was nothing in the defendant's past that specifically warranted SAMs restrictions.¹⁰ But in the instant case, the defendant has already proved that SAMs restrictions are necessary given his past behavior. The government should not have to

¹⁰ As to the other case the defendant cites, In re Basciano, 542 F.3d 950 (2d Cir. 2008), the defendant in that case, like Guzman here, had a prior history of violence. But unlike Guzman, the defendant in Basciano had never escaped from prison once, let alone twice. Moreover, the scale of Basciano's organization, as large as it was at the time of his prosecution, is dwarfed by the global scale of the Cartel.

wait for the defendant to undertake further violent actions in order to justify the SAMs restrictions. Rather, SAMs restrictions are designed to prevent death or serious injury, and the Court should uphold them in this case because this defendant's history, characteristics and prior conduct demonstrate that he is likely to seek to cause such harm to others.

V. The SAMs Do Not Violate the Defendant's Sixth and First Amendment Rights

The defendant claims that the SAMs restrictions violate his Sixth and First Amendment rights because (1) he cannot correct allegedly false accounts of his life that are widely available to the public, hindering his right to a fair and impartial jury under the Sixth Amendment, and (2) he is only permitted to meet with his defense team, immediate family members and religious personnel, and cannot engage in group prayer, violating his freedom of association and religion under the First Amendment. (See Def. Br. at 23). The defendant's claims are without merit.

First, the SAMs restrictions do not violate the defendant's Sixth Amendment rights by restricting his ability to make public comments. The defendant's counsel possess the ability to correct any purported "false" accounts of his life to the public. In fact, the Federal Defenders have given press conferences after each of the defendant's court appearances and filed multiple documents on the public docket, advocating for the defendant and advancing his viewpoint. (See, e.g., Def. Br. at 3 (claiming that government's allegations of defendant's narcotics trafficking in detention memorandum and press conference is "legend" and "myth")). The press has also widely reported defense counsel's statements.

For example, numerous news outlets reported on the instant motion. See, e.g., El Chapo Guzman's lawyers say he's suffering hallucinations while locked down in isolation, Business Insider (March 16, 2017), available at <http://www.businessinsider.com/el-chapo-guzman-jail-in-the-us-complaints-abuses-hallucinations-2017-3> (last visited on March 17, 2017); El Chapo Guzman suffering effects of solitary confinement, his lawyers say, Fox News (March 16, 2017), available at <http://fox43.com/2017/03/16/el-chapo-guzman-suffering-effects-of-solitary-confinement-his-lawyers-say/> (last visited on Mar 17, 2017); El Chapo Guzman's health is deteriorating in solitary confinement, defense team says, Washington Post, (March 14, 2017), available at https://www.washingtonpost.com/news/worldviews/wp/2017/03/14/el-chapo-guzmans-health-deteriorating-in-solitary-confinement-defense-team-says/?utm_term=.4878985c5ea3 (last visited on March 18, 2017).

Moreover, to the extent that the defendant complains about his public image as a narcotics trafficker and, specifically, the government's allegations in its detention memorandum and press conference, the defendant has cultivated and perpetuated this image himself. See Sean Penn, El Chapo Speaks, Rolling Stone (January 9, 2016), available at <http://www.rollingstone.com/culture/features/el-chapo-speaks-20160109> (last visited March 18, 2017) (defendant quoted as stating: "I supply more heroin, methamphetamine, cocaine and marijuana than anybody else in the world. I have a fleet of submarines, airplanes, trucks and boats."), Watch El Chapo's Exclusive Interview In Its 17-Minute Entirety, Rolling Stone (January 12, 2016), available at <http://www.rollingstone.com/culture/videos/watch-el-chapo-s->

exclusive-interview-in-its-17-minute-entirety-20160112 (last visited on March 18, 2017) (video of defendant discussing his rise and prominence as a narcotics trafficker).¹¹

Second, the SAMs restrictions on visitation and group prayer do not violate the defendant's First Amendment rights. The Second Circuit has repeatedly upheld SAMs restrictions that limit an inmate's First Amendment rights where they are reasonably related to the government's penological concerns. See Felipe, 148 F.3d at 110-11 (2d Cir. 1998) (rejecting inmate's First Amendment argument on the ground that the SAMs restrictions permitted him to exercise his First Amendment right in a more limited manner) (citing Thornburgh, 490 U.S. at 417-18 ("The Court in Turner did not require that prisoners be afforded other means of communicating with inmates at other institutions Rather it held . . . it was sufficient if other means of expression . . . remained available."))).

In Felipe, the court sentenced the defendant, the former leader of the Latin Kings gang, to life imprisonment, but he continued to engage in criminal conduct while behind bars, including ordering the murders of gang rivals. 148 F.3d at 106. Accordingly, the court imposed special confinement conditions on the defendant, which included a total ban on correspondence and visits with others except for his attorney and close family members approved by the court, and the monitoring of all correspondence and visits with anyone except his attorney. Id. at 107. Applying the Turner test, the Second Circuit concluded that his case

¹¹ The defendant states that the video of the government's press conference in this case been viewed approximately 5,000 times on YouTube. By contrast, the video of the defendant's interview with Rolling Stone, where the defendant boasts about his prowess as a narcotics trafficker, has been viewed more than 1,000,000 times on YouTube.

warranted such severe restrictions, and did not violate the defendant's First Amendment rights. See id. at 110-11.

Moreover, in El-Hage, where the al Qaeda-affiliated defendant was subject to pretrial SAMs restrictions similar to those here, the Second Circuit again rejected the claim that the conditions of confinement violated the defendant's First Amendment rights. See El Hage, 213 F.3d at 81-82. Thus, Felipe and El-Hage make clear that SAMs may be implemented when needed and do not violate a defendant's First Amendment rights.

Here, as discussed in the detention memorandum and detailed in the government's ex parte submissions, the defendant's prolific use of violence, including murder and torture, his history of obstructing ongoing investigations, prison escapes and operating the Sinaloa Cartel from within prison, justify the SAMs restrictions on the defendant's visitation and comingling with other inmates, thereby precluding group prayer.¹² Given the defendant's past conduct, consistent with the Second Circuit's decisions in Felipe and El-Hage, any SAMs restrictions that arguably impact the defendant's First Amendment rights are valid and necessary.

VI. The Defendant's Isolation Does Not Violate the Fifth Amendment

Throughout his brief, the defendant laments the solitary nature of his confinement and claims that the SAMs violate his Fifth Amendment right to due process. As noted above, the defendant has been visited by his counsel, paralegal and staff members of the

¹² The SAMs restrictions do permit the defendant to meet with religious personnel, and defense counsel acknowledges that he has met with the prison's religious personnel on two occasions, including with a translator.

Federal Defenders and private attorneys on a near daily basis since the day after his arrival in the United States on January 19, 2017. The visits by defense counsel and its staff on some occasions have lasted up to five hours per day. See supra at 9-10. Many of the visits by the Federal Defenders' staff have been for the purpose of teaching the defendant to read and speak English, and to read him newspapers. In addition to these lengthy visits, the defendant has one hour of recreation daily in a room equipped with exercise equipment and a window allowing for fresh air and light. And, contrary to the defendant's claims, his cell has a frosted window that allows daylight into the room. Although the defendant claims that his mental health is deteriorating to the point where he has begun to have auditory hallucinations, a visit of the defendant by a staff psychologist at the MCC revealed that the defendant had merely been hearing sound from a radio that a staff member in the defendant's MCC unit had been playing.

The solitary circumstances of the defendant's confinement are reasonably related to a legitimate penological interest, as described above. Because the government implemented the SAMs to address the significant security concerns posed by the defendant, and the SAMs are reasonably related to those serious concerns, they should be upheld.

CONCLUSION

For the forgoing reasons, the Court should deny the defendant's motion to vacate the SAMs, except that the Court may modify the SAMs to allow defense counsel and private counsel, who have been precleared to meet with the defendant, to send prescreened communications to the defendant's family members for the limited purpose of communicating the defendant's desire to retain particular counsel and the logistics of obtaining funds to do so.

Dated: Brooklyn, New York
March 21, 2017

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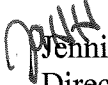
Washington, D.C. 20530

LIMITED OFFICIAL USE

MEMORANDUM

FEB 09 2017

TO: Thomas R. Kane
Acting Director
Bureau of Prisons

FROM:  Jennifer A.H. Hodge
Director
Office of Enforcement Operations

SUBJECT: Modification Allowing Contact with Special Administrative Measures 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 Joaquin Archivaldo Guzman Loera, aka El Chapo (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. Because of his proclivity for violence, the Attorney General placed Guzman under Special Administrative Measures (SAM), effective February 3, 2017.

In reviewing the signed SAM, BOP officials at MCC noticed that footnote 3 from Section 2.b.i. of the SAM had inadvertently been omitted. The purpose of this modification is to correct this error by adding the missing footnote as follows:

LIMITED OFFICIAL USE

2. 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.³

All other SAM provisions for the above-captioned individual will continue in full force and effect for the remainder of the current authorization period of one year, subject to my further direction.

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.

³ "Prcleared," when used with regard to an interpreter/translator, refers to an interpreter/translator 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.