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March 29, 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 in reply to the Government's Memorandum of Law in Opposition to Defendant's Motion to Vacate or Modify Special Administrative Measures ("Govt. Memo"). In its memorandum, the Government seeks to keep in place draconian conditions of confinement imposed on Mr. Guzman by the Department of Justice through so-called Special Administrative Measures ("SAMs"). The Government posits that the oppressive nature of Mr. Guzman's solitary confinement, as well as complete isolation from his family, are necessary to address "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." (Govt. Memo. 2). Furthermore, the Government contends that this Court has no jurisdiction to consider Mr. Guzman's objections to the SAMs. (*Id.* at 13-16).

As stated in our submission of March 13, 2017 (Dkt. No. 50), the SAMs, as currently applied, are not authorized under 28 C.F.R. § 501.3. Furthermore, the nature of Mr. Guzman's confinement under the SAMS violates his Sixth Amendment rights to have effective assistance of counsel, develop a defense, conduct a meaningful investigation, and his right to a fair and impartial jury; his Fifth Amendment right to due process; and his First Amendment rights to free speech and freedom of religion. Also, the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a), does not deprive the Court of jurisdiction over Mr. Guzman's requests to modify the conditions of his pretrial confinement.

The Government does concede that the SAM's restrictions on defense counsel's communications with Mr. Guzman's family interfere with his right to counsel of his choice. To remedy this constitutional violation, the Government proposes that defense counsel, or other private counsel who have met with Mr. Guzman, be permitted 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." (*Id.* at 24). This proposal is inadequate to remedy the infringement on Mr. Guzman's right to counsel imposed by the SAMs.

Therefore, for the reasons stated below, and in our letter of March 13, 2017, Mr. Guzman moves for an immediate modification of the SAMs to allow: 1) him 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) defense counsel or private attorneys to relay messages between Mr. Guzman and third parties for the limited purposes of ascertaining and securing the assets necessary to retain counsel—without disclosing the contents of these messages to the Government. Mr. Guzman further moves that the SAMs be vacated in their entirety and asks the Court to sign the attached proposed order which will allow a researcher from Amnesty International USA to visit 10 South at MCC to investigate the conditions of Mr. Guzman's confinement.

I. Background

A. The Conditions of Confinement

The Government argues that Mr. Guzman is no worse off than other inmates held under SAMs. (*See* Govt. Memo. 37-38 *citing United States v. Felipe*, 148 F.3d 101 (2d Cir. 1998) *and United States v. El-Hage*, 213 F.3d 74 (2d Cir. 2000)). In fact, Mr. Guzman is being held under the worst, most restrictive conditions of any prisoner currently detained by the United States government.

The defendants in the cases cited by the Government were held under objectively better conditions than Mr. Guzman faces. The defendant in *Felipe* (who was *convicted* of ordering murders while in prison) was allowed to communicate with five people in addition to his attorney, including his sister-in-law and his niece. *Felipe*, 148 F.3d at 107. The defendant in *El-Hage* was eventually housed with a cellmate and allowed to call his family three times per month. *El-Hage*, 213 F.3d at 78. Mr. Guzman, who has not been convicted of any crime, has had no contact with his family since his extradition. It is significant that the cases cited by the Government as precedent for the oppressive nature of Mr. Guzman's detention involved conditions of confinement clearly less severe than those imposed in this case.

Similarly, in *United States v. United States v. Mohamed*, 103 F. Supp. 3d 281 (E.D.N.Y. 2015), the defendant was charged with the murder of a civilian employee of the Department of Defense and the attempted murder of a United States Marine in an attack on the U.S. Embassy in Niger. *Mohamed,* 103 F. Supp. 3d at 282. The defendant was alleged to have ties to terrorist organizations, including Boko Haram and al-Qaeda. *Id.* at 283-284. Mr. Mohamed had been sentenced to serve 20 years in prison in Saudi Arabia for an alleged 2009 attack on Saudi officials. Mr. Mohammed was also alleged to have participated in two prison breaks before his detention in the United States; the escapes were alleged to have been conducted with the assistance of terrorist groups and it was alleged that three prison guard were killed during one of the escapes. *Id.*at 288. At the time of his detention in the United States the defendant's bothers were reported to have ties to terrorist organizations. Yet, unlike Mr. Guzman, Mr. Mohamed was permitted to have contact with his wives. *See United States v. Mohamed*, 13-cr-527, E.D.N.Y., Dkt. No. 41 at 13.

The severity of Mr. Guzman's confinement also outstrips that imposed on notorious, convicted criminals held at USP Florence ADMAX, known colloquially as Supermax. Even in

Supermax, inmates are allowed to watch television in their cells and to exercise outside in cages where they can see, and speak with, other inmates. *See What's life like in Supermax prison?* (CNN television broadcast, June 25, 2015.)[1] Mr. Guzman exercises alone in a cell and has only recently gained access to television (meaning whatever DVD the jail staff decides to play) during the one hour of recreation he is allowed on weekdays. He is never outside.

The Government appears to argue that Mr. Guzman is exaggerating the nature of his confinement.[2] (*See* Govt. Memo. 11-12). After all, according to the Government, Mr. Guzman has the largest cell in the unit with a "frosted glass" window and a radio. (*Id.*) There is no window in Mr. Guzman's cell. Defense counsel has not been afforded the opportunity to inspect the cell,[3] but Mr. Guzman describes a space where a window may have once been. It is guarded by bars and filled by a sheet of opaque plastic. Mr. Guzman can't say whether it "allows daylight to come into his cell" because the light in his cell has never been turned off and he can't tell from the "window" if it is daytime or nighttime.

The Government also grossly overstates the BOP's attention to Mr. Guzman's concerns. Mr. Guzman comes from a country where tap water can be hazardous. After arriving at MCC, he asked if he could purchase bottled water. Despite the Government's assurance that the BOP has allowed him to "buy bottled water from the commissary" (*id.* at 12), Mr. Guzman has never been allowed to do so. While inmates in general population are permitted to purchase bottled water, Mr. Guzman has not been permitted to do so. Federal Defenders staff has reviewed all of the

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[1] *Available at* http://www.cnn.com/2015/06/25/us/dzhokhar-tsarnaev-supermax-prison/.

[2] In support of their argument, the Government points to statements by Silvia Delgado, one of Mr. Guzman's attorneys from Mexico. (Govt. Memo. 12-13, n.6). However, the Government is well aware, since it prevented Ms. Delgado from visiting or speaking with Mr. Guzman, that she has had no direct contact with Mr. Guzman and cannot provide any firsthand account about his conditions. Further, Ms. Delgado's statements were clearly based on a misunderstanding of Mr. Guzman's actual conditions, as she reported that Mr. Guzman is allowed one hour outside to exercise, a fact the Government knows to be false. *See* http://www.rgvproud.com/news/local-news/oneof-joaquin-el-chapo-guzmans-attorneys-speaks-about-his-extradition-and-currentsituation/654748848 (last visited on March 28, 2017). Further, Ms. Delgado was largely referring to the fact that Mr. Guzman's visits with defense counsel were more limited in Mexico. Certainly Mr. Guzman would prefer the visits with his family he was entitled to in Mexico to the visits from defense counsel he receives in New York.

[3] Amnesty International USA recently requested access to 10 South to observe the conditions of confinement, but has not yet been given access.

commissary forms provided to Mr. Guzman.[4] The forms provided to Mr. Guzman are all in English. Further, bottled water is not included in the list of beverages.[5]

Similarly, the Government's assertion that "there are typically Spanish-speaking staff available" (*id.*) has proven false. Mr. Guzman still often finds himself struggling to make himself understood to the staff at the MCC. It must also be noted that the Requests for Administrative Remedies filed by Mr. Guzman were all prepared and served by defense counsel and their paralegals and that, without this assistance, Mr. Guzman would likely be unable to comply with the BOP's byzantine Administrative Remedy Program.

It is true that "[t]he BOP [] allowed the defendant to purchase a clock from the commissary." (*Id.*) It is also true that officials took it away from him a few days after he bought it—with no explanation and no refund. It's difficult to see how these facts advance the Government's argument that the SAMs, as enforced by BOP, are not punitive in nature.

The Government has little to say about the effects of solitary confinement on prisoners in general and Mr. Guzman in particular. This was perhaps to be expected, since the devastating effects of solitary confinement are widely acknowledged. Instead of disputing these deleterious effects, the Government argues that Mr. Guzman isn't really in solitary since his counsel and their staff meet with him twice a day, on average. (*Id.* at 9). Even with this burdensome (for counsel) visitation schedule, Mr. Guzman has already begun to exhibit worrying signs of mental illness. The Government writes off "claims of auditory hallucinations" as "merely [] hearing sound from a radio." (*Id.* at 13). However, unless that radio was playing Mexican music, Mr. Guzman is hearing non-existent sounds.

B. <u>Mr. Guzman's Family</u>

As noted above in and our letter of March 13, 2017, Mr. Guzman has had no direct contact with his family since he was extradited to this country. His wife, Emma Coronel Aispuro, applied to the BOP to visit him. Proof of the marriage was provided to the Government. Only after receiving these documents did the Government inform defense counsel that Ms. Coronel would not be allowed to visit her husband. The Government relied on its February 2, 2017 *ex parte* letter to the Court in rendering this decision. As this letter predated Ms. Coronel's application, defense counsel can think of no reason why we weren't informed at the beginning of the process that Ms. Coronel would not be allowed to see her husband. Instead, time and resources were invested in assisting Ms. Coronel with her application, including translating a marriage document, for no apparent reason.

It is for these reasons that the Court should reject the Government's implicit assertion that the only reason Mr. Guzman hasn't been able to see anyone from his family is because "defense

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[4] When a paralegal requested that Mr. Guzman be allowed to give his commissary forms to the paralegal to provide to defense counsel, she was informed that Mr. Guzman would have to purchase stamps and send the documents through the mail to counsel.

[5] Blank commissary forms are available on the Bureau of Prisons website clearly indicate that bottled water is not available on 10 South. *See* https://www.bop.gov/locations/institutions/nym/NYM_CommList.pdf

counsel have not made a request for any other family member to visit the defendant." (Govt. Memo. 11). The Government has been investigating Mr. Guzman for decades. It is aware of all of Mr. Guzman's family members. If there is a family member that would pass the Government's "vetting" procedure (and be able to obtain a visa), the Government should inform defense counsel, rather than requiring counsel to participate in another charade of a clearance process.

As noted in our prior letter, Ms. Coronel is not only the family member closest to Mr. Guzman, she is also one of very few who may legally enter the United States. In its memorandum, the Government notes that it "discussed facilitating a visit between the defendant and his minor children with defense counsel" (*id.*), as if this were some sort of proof of good faith. In fact, Mr. Guzman and Ms. Coronel's twin 6-year old daughters are much too young to be expected to travel to another country, enter a high security prison, be locked in a small visiting booth with strangers while they sit behind a screen, and speak to their father without their mother present.

The Government identifies two potential immediate family members Mr. Guzman could elect to visit him in keeping with the SAMs, an "adult daughter and his sister" (*Id.* 10). Regarding the "daughter" it seems peculiar indeed that the Government is prepared to allow Rosa Isela Guzman Ortiz to establish her paternity through an article in the *Guardian*, but required Ms. Coronel to submit legal documentation of her relationship to Mr. Guzman (*Id.* 10).[6] The Government is obviously well aware of Ms. Coronel's relationship to Mr. Guzman. Mr. Guzman does not believe that Ms. Guzman Ortiz is in fact his daughter and maintains that he has no relationship with her. She is not someone he would reasonably rely on when retaining private counsel. As for Mr. Guzman's sister, he does not believe at this point it would be feasible for her to travel to the United States, or assist in the actual logistics for retaining counsel. Further, it can hardly be said that a sister is a substitute for the counsel of a spouse or partner. The law has long recognized the special relationship between a husband and wife as distinct from other family members. *See, e.g. Trammel v. United States*, 445 U.S. 40, (1980) (Describing the "ancient roots" of the spousal privilege and its role in "fostering the harmony and sanctity of the marriage relationship.")

The fact remains that Ms. Coronel is the only member of Mr. Guzman's family who can reasonably be expected to travel to New York and visit with him. The Government argues that the *ex parte* allegations that undergird its prohibition on Ms. Coronel visiting are further proven by Ms. Coronel's visit to the MCC after defense counsel were informed that she would not be approved. (Govt. Memo. 11, 32). All that this episode proves is that Mr. Guzman must be able to meet with Ms. Coronel if he is to arrange to hire a private attorney. Defense counsel was appointed by the Court and had never met Mr. Guzman or Ms. Coronel before the day Mr. Guzman first appeared in this District. It is unsurprising that Ms. Coronel would have questions about and perhaps not trust information provided to her by strangers. Under these circumstances, appearing at the jail in person to request visitation is a rational action. A similar problem is likely to arise if a private attorney contacts Ms. Coronel and tells her that Mr. Guzman has hired him or her. Under the SAMs, even with the Government's proposed modification, she would have no way to confirm her husband's wishes.

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[6] *citing 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 28, 2017)

C. Defense Counsel's Visitation and the Role of the Public Defender/Defense Attorney

In its memorandum, the Government correctly notes that, since Mr. Guzman's first appearance in court, he has had, on average, four to five hours of legal visits a day—either with appointed counsel, Federal Defender paralegals, or SAMs cleared private attorneys who are permitted to visit to explore the potential of representation. (Govt. Memo. 9-10, 38-39). The Government makes a point of noting that "on many of these occasions, MCC officials have noted that [Mr. Guzman] has met exclusively with paralegals from the Federal Defenders in the evening hours." (*Id.* at 10). The only reason to note this visit schedule is to cast the specter of some impropriety—but the SAMs clearly allow paralegals to meet with Mr. Guzman on their own and make no distinction between the hours of visitation.

Before arriving at 10 South's counsel visit area, attorneys and staff must pass through a metal detector, a number of security check points, and be searched with a handheld metal detector three separate times. For female visitors this generally means, unlike the airport, they are searched by male guards. These counsel visits are designated as no-contact visits by the MCC (the terms of the SAMs allow for contact visits). During the legal visit, both the visitor and Mr. Guzman are locked into opposite sides of a small enclosed booth. Mr. Guzman is separated from his visitors by a wall that is half metal screen and half Plexiglas. It is not possible to pass papers back and forth, papers must be held up to the Plexiglas so the party on the other side may view them. No physical contact is permitted between Mr. Guzman and his attorneys, not even a handshake in greeting or before departing.

The doors to the visiting booth have a large window allowing the BOP officers, who sit at a desk just a few feet away, to view the parties during the visit. Additionally there are cameras which also appear to capture the legal visit.[7] Despite their close proximity to the visit from their seated positions, the BOP officers routinely walk past the interview booth during the counsel visit. While there is a "white-noise" machine, it clearly does not serve its intended purpose as counsel can easily hear the officers as they chat with each other and can verbally communicate with them when the need arises. As is apparent from the Government's response, the Assistant United States Attorneys prosecuting Mr. Guzman are keenly aware of every legal visit Mr. Guzman receives, who was involved, and how long it lasted. The Government also appears to monitor the contents of what are supposed to be privileged confidential communications. For example, the Government reports that paralegals were observed reading articles to Mr. Guzman or teaching him English. (*Id.* 10, 39).

It is under these burdensome, improper conditions that we must conduct Mr. Guzman's privileged, confidential legal visits. To be clear, the SAMs ***do not*** permit the monitoring of Mr. Guzman's privileged communications, which the Government acknowledges. (*Id.* 5, n.1). Yet the Government appears to be doing just that. The Government's absurd claims that the BOP officers accidentally determined that legal visitors were teaching Mr. Guzman English and reading articles to him by observing the mouthing of words, or inadvertently seeing a piece of paper held up to the

[7] The Government avers that prison officials must "maintain visual contact for safety purposes." (Govt. Memo. 10). There is no basis for this claim as both Mr. Guzman and the visitors are locked inside separated ends of the booth and are physically separated. "Maintaining visual contact" serves no safety function under these circumstances.

Plexiglas, defy credibility. It offends the very nature of the right to counsel and the right to confidential, privileged communications with one's lawyer to have legal visits conducted in a virtual fishbowl, while the BOP secretly observes and reports back to the prosecutors assigned to the case.

Further, the allegation in its memorandum that Federal Defender staff are conducting legal visits for the "purpose of teaching the defendant to read and speak English, and to read him newspapers" demonstrates the Government's complete ignorance of the importance of the relationship between a defendant and the defense team.[8] The attorney-client relationship is predicated on trust. No lawyer develops such trust by limiting their interactions to discussions of the facts and law controlling a given case. Indeed, lawyers routinely invite clients to meals, concerts and sporting events—and are generally entitled to deduct half the cost of doing so on their taxes as "ordinary and *necessary*" business expenses—in order to develop relationships with their clients. Mr. Guzman's lawyers do not have that luxury given his strict confinement. The Government's efforts to pass judgment or diminish the necessity of our having what they view as extraneous conversations with our clients is ill-informed and borders on outrageous. As public defenders, appointed by the Court, Federal Defenders must always overcome the suspicion on the part of a client that somehow the loyalty of his or her attorney lies with the Court or Government and not the client.[9] An attorney cannot instill faith in the fairness of the judicial process without first establishing a relationship of trust with the client. While this is an ever present concern for any public defender, it is especially heightened in this case, where Mr. Guzman is facing a minimum sentence of life in prison, has been completely cut off from friends and family, and was airlifted to New York without prior notice to him or his attorneys in Mexico.

The Government seems to argue that Mr. Guzman is not actually suffering from the effects of isolation because counsel has visited him as often as possible. Surely visits from strangers, appointed by the Court, cannot substitute for the ability to communicate with his wife, children, and family. Further, counsel has visited Mr. Guzman whenever possible precisely because we have seen Mr. Guzman's condition deteriorate as he languishes in solitary confinement. While absolutely necessary, the visits are a tremendous strain on resources. At this early stage of the case, before defense counsel has received any discovery, it is onerous, but not impossible, to visit Mr. Guzman every day. Once discovery and trial preparations begin in earnest, this will not be the case. The Government's reliance on defense counsel visits to keep Mr. Guzman sane will likely be proven mistaken as the case progresses. And Mr. Guzman's condition may well deteriorate to the point that competency hearings may be required under 18 U.S.C. § 4241.

Further, defense counsel is not alone in their concern over the conditions Mr. Guzman's confinement. In a letter dated to AUSA Andrea Goldbarg, March 28, 2017, Justin Mazzola, the

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[8] Defense counsel has a duty to "establish a relationship of trust and confidence" with their client. ABA GUIDELINES DEFENSE FUNCTION, Lawyer-Client Relationship, Guideline 4-3.1 (2008).

[9] *See* Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, Law & Contemp. Probs., WINTER 1995, at 81, 87 ("Clients' misunderstandings of the criminal justice system often lead them to level unfair charges against their public defenders. For instance, public defenders have been criticized for their close alliance with other court agents, including judges, prosecutors, and police.") (*Citations omitted.*)

Deputy Director of Research for Amnesty International USA wrote to express his organization's concerns "about the conditions under which Joaquin Guzman Loera has been held while in federal pre-trial detention." (Letter of Justin Mazzola to AUSA Andrea Goldbarg, date March 28, 2017, attached hereto as Exhibit A). Deputy Director Mazzola wrote that Mr. Guzman's current conditions of confinement fall below the "United Nations (UN) Standard Minimum Rules for the Treatment of Prisoners." (Ex. A at 1). Amnesty International is seeking permission from the Government and the Bureau of Prisons to meet with Mr. Guzman at the MCC and inspect his conditions for themselves. We join in this request and ask the Court to sign the attached proposed order permitting Mr. Mazzola to meet with Mr. Guzman and to observe the conditions of his confinement in 10 South. (Proposed Order attached hereto as Exhibit B).

II. ARGUMENT

A. The Court has jurisdiction to grant relief

The Government argues this Court does not have jurisdiction to vacate or modify the SAMs because Mr. Guzman has not exhausted his administrative remedies. In support of this argument, the Government contends that Prison Litigation Control Act ("PLRA"), which states "[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), controls. The PLRA was enacted "to reduce the quantity and improve the quality of prisoner suits." *See Porter v. Nussle,* 534 U.S. 516, 524-525 (2002). However, the instant motion—seeking a ruling or order from the court on a matter impacting the pending criminal proceedings—is substantively different that than the initiation of a new lawsuit. *See Sattar v. Gonzales*, 2010 WL 685787, at 2 (D. Colo. Feb. 23, 2010).

Mr. Guzman has not brought a separate action, rather Mr. Guzman's motion directly addresses this Court's ability to manage these criminal proceedings. Mr. Guzman's motion to vacate or modify the SAMs is not an "action" under 42 U.S.C. § 1983, as was the case in *Porter;* thus, the Government's reliance on *Porter* is misplaced. In *Porter,* the Supreme Court held that an inmate had to exhaust administrative remedies before bringing a 42 U.S.C. § 1983 lawsuit under the PLRA. *Porter v. Nussle,* 534 U.S. 516, 524, (2002). *Porter* did not hold that "an inmate's failure to exhaust administrative remedies deprived courts of subject matter jurisdiction over a 28 U.S.C. § 2241 petition or any other type of claim." *See Santiago-Lugo v. Warden,* 785 F.3d 467, 472 at n.1 (11th Cir. 2015). As noted above, Mr. Guzman has not filed a 42 U.S.C. § 1983 lawsuit under the PLRA. Mr. Guzman has challenged the constitutionality of the imposition of Special Administrative Measures. Specifically, Mr. Guzman submits that the SAMs impair his ability to present and assist in his defense, his right to counsel, his right to fair and impartial jury, and severely impact on his physical and mental condition in such a manner that, left unaltered, will undoubtedly effect his competency to stand trial. Thus, *Porter* does not control.[10]

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[10] The Government's reliance on *Booth v. Churner*, 532 U.S. 731 (2001) is equally misplaced. In *Booth* the Supreme Court ruled that an inmate who brought a suit under §1983 seeking money damages must exhaust administrative remedies. *Id.* at 39-41.

The other cases relied on by the Government are equally unavailing. Three of the cases concern defendants challenging conditions of confinement imposed as part of their sentences, not constitutional challenges to the impact of such conditions on their pending criminal cases. *See United States v. Yousef*, 327 F.3d 56, 165 (2d Cir. 2003)(Defendant objecting to district court's recommendation of special conditions of confinement as part of his sentence was required to exhaust administrative remedies; as the district court's recommendation was not binding on the Bureau of Prisons, the recommendation was not appealable as a final decision or final sentence.); *United States v. Abu Ali*, 528 F.3d 210, 243–44 (4th Cir. 2008)(Holding a defendant objecting to SAMs imposed as part of his sentence based on Attorney Generals recommendation was required to exhaust his administrative remedies); *Yousef v. Reno*, 254 F.3d 1214 (10th Cir. 2001) (Defendant, a sentenced prisoner, brought a *Bivens* action seeking monetary relief challenging SAMs imposed in conjunction with his sentence.) The only cited case even possibly on point, *United States v. Khan*, 540 F.Supp. 2d 344 (E.D.N.Y. 2007) is not only an outlier among courts who have considered challenges to conditions of confinement brought by pretrial detainees, it is readily distinguishable. In *Khan*, the defendant brought a challenge to conditions imposed as a result of a determination made by the acting warden of the prison, not the imposition of SAMs by the attorney general. *Khan*, 540 F.Supp 2d at 346-47. Further, unlike Mr. Guzman, there is no indication that Khan raised an allegation that his conditions of confinement impacted on his ability to assert his constitutional rights in his pending criminal case.

At the heart of Mr. Guzman's challenge to the SAMs is the impact of the SAMs on his right to counsel and his ability to present and assist in his own defenses. Mr. Guzman's challenges relate directly to this Court's ability to fairly and efficiently manage the defendant's criminal prosecution, and is not a motion "within the category of lawsuits to which the PLRA was aimed." *See In Re Nagy,* 89 F.3d 115, 117. (2d Cir. 1996) Mr. Guzman's challenge is nearly identical to the challenge brought by the defendant in *United States. v. Hashmi*, 621 F. Supp. 2d 76 (S.D.N.Y. 2008). The court in *Hashmi* held that Mr. Hashmi's constitutional challenge to his SAMs did not constitute an "action" within the meaning of the PLRA, thus, Mr. Hashmi was not required to exhaust his BOP remedies and the district court had jurisdiction over his claims. *See Hashmi* 621 F. Supp. 2d at 84.

In *United States. v. Savage*, the defendant serving a 30-year prison sentence was indicted for charges including 11 counts of murder in aid of racketeering. *United States. v. Savage* 2010 WL 4236867 (E.D. Pa. Oct. 21, 2010). It was alleged that the defendant had ordered several of the murders while incarcerated at the Federal Detention Center in Philadelphia. *Savage* 2010 WL 4236867, at 1. After the imposition of the SAMs, Mr. Savage was transferred to the MCC. In its decision, the District Court for the Eastern District of Pennsylvania recognized that the MCC is a severely restrictive facility even in comparison to the maximum security unit "ADMAX" at Florence Colorado where that defendant had previously been housed. *Id* at 1-2. Although Savage was accused of ordering murders while incarcerated, and "threatening to kill federal agents, prisons officials and witnesses," the government and the Bureau of Prisons agreed to a modification of the defendant's SAMs to facilitate contact visits between the defendant and his attorneys by agreeing to transport him once a month to the FDC in Philadelphia for such visits. Nonetheless, Savage moved to vacate the SAMs in their entirety, complaining that his legal visits were inadequate, he had insufficient access to the law library and that he was unable to focus on his defense due to his conditions of confinement. *United States v. Savage*, 2010 WL 4236867, at 2 (E.D. Pa. Oct. 21, 2010). The court found that Savage's motion directly related to the court's "ability to manage these criminal

proceedings" and, thus, was not barred for failure to exhaust his administrative remedies under the PLRA" *Savage* at 7. In reaching this decision, the *Savage* court noted that a "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" *Savage* 2010 WL 4236867, at 3-7.

Other courts have recognized that motions by defendants relating to issues affecting their pending criminal cases are not the types of claims the PLRA was enacted to handle, and, as such, the exhaustion requirement does not apply. In *Sattar v. Gonzales*, 2010 WL 685787, the district court held the defendant was not required to exhaust administrative remedies before challenging his SAMs because his challenge related to his right to access to the courts. *See Sattar*, 2010 WL 685787at 2.[11] *See also United States. v. Lopez*, 327 F. Supp. 2d 138, 140-42 (D.P.R. 2004) (Holding defendant challenging the impact of the SAMs on his right to counsel and his ability assist in his own defense need not exhaust administrative remedies.) More recently, another Judge in this District held the exhaustion requirement inapplicable to a SAMs challenge brought by a defendant in his pending criminal proceeding. *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 over Mr. Guzman's motion to vacate or modify the SAMs.

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). Further, as noted above Porter does not impose an exhaustion requirement on motion made pursuant to 28 U.S.C. § 2241.

B. Appointment of Firewall Counsel

As a preliminary matter, should the SAMs be retained in any capacity, Mr. Guzman requests that firewall counsel be appointed to conduct any and all clearance requests for visitors to Mr. Guzman. Additionally, we request that the Court order the MCC to have no further communications with the prosecution team assigned to Mr. Guzman's case concerning observations made by BOP staff of confidential, privileged counsel visits. In its order granting the modified protective order dated March 21, 2017 (Dkt. No. 51), the Court recognized that assigning the vetting of defense team members "to the very Government attorneys who are prosecuting defendant appears to be improper in that it permits a "potential spy in the defense camp" because the Government would be in the position to "learn[] privileged defense strategy" from the individuals defendant is interviewing or seeking to retain as part of his defense team." (*Id.* at 3)(*citations omitted*).

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[11] In reaching this conclusion, the *Sattar* court considered the holding in *Yousef v. Reno*, 254 F.3d 1214 (10th Cir. 2001), a case relied on by the Government in its memorandum. *See Sattyr* at 1. *Yousef* does not command a different result, unlike the instant case, the defendant in *Yousef* filed a separate *Bivens* action, not a motion seeking redress in his pending criminal case. *See Yousef,* 254 F.3d 1214.

As the Court recognized, with regard to the protective order, firewall counsel is necessary to safeguard Mr. Guzman's rights under the Sixth Amendment. The Sixth Amendment concerns expressed by the Court regarding the use of the same prosecutors to vet experts and member of the defense team who will view protected material, extend to the SAMs process itself. The prosecution team should not be vetting defense team members who are visiting Mr. Guzman regardless of whether they have access to the protected material. Thus, we ask that the SAMs clearance process be assigned to the US Attorney's firewall counsel.[12]

C. Right to Counsel[13]

The Government's proposed modification of the SAMs does not cure the Sixth Amendment violation caused by the SAMs. Allowing defense counsel or private counsel "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" (Govt. Memo. 24) does not provide Mr. Guzman's family any confidence that defense counsel or private counsel are accurately communicating Mr. Guzman's wishes.[14]

Mr. Guzman was extradited to this country with no advance notice to either him or his family. Upon his arrival at the courthouse on January 20, 2017, he was met by defense counsel who explained that they expected to be appointed by the Court to represent him. Neither Mr. Guzman nor any of his family members had ever met defense counsel prior to January 20. Neither had they any experience with the justice system in the United States. This circumstance provides Mr. Guzman's family with little basis to trust appointed counsel. As previously noted, this situation explains Ms. Coronel's visit to the MCC to obtain information about visiting her husband, even though defense counsel had already told her of the Government's decision prohibiting her from seeing or speaking to her husband.

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[12] In its March 21 Order, the Court suggests that the Government could appoint the prosecution teams from the Western District of Texas or Southern District of California as firewall counsel. Defense counsel notes that this could raise additional Sixth Amendment concerns if Mr. Guzman were later tried in those districts.

[13] In its memorandum, the Government indicates that its distinction between paralegals and investigators in the SAMs is based on who the Government believes is a "core member" of the defense team. (Govt. Memo. 28). Obviously, the Government cannot say who is necessary for the defense team; the defense still submits that the distinction is arbitrary. However, since the Government says that it will consider modification of this rule, we will not pursue it here. Further, the defense will accept the Government's clarification in its memorandum that "messages" as included in the SAMs is defined as "verbatim messages." (*Id.* at 27-28).

[14] The Government's insistence that *any* communication for this purpose be "prescreened" poses the same problems that arose from the Government's application for a protective order. (Dkt. No. 28). In the Court's words, allowing "the very Government attorneys who are prosecuting defendant" to prescreen communications would permit "a potential spy in the defense camp." (Dkt. No. 51 *quoting United States v. Massino*, 311 F. Supp. 2d 309, 311 (E.D.N.Y. 2004).

The Government's proposal, by precluding *any* direct communication between Mr. Guzman and his family, simply continues this untenable situation. Without some personal assurance from Mr. Guzman to his family about what he wants in regards to hiring an attorney, it is unreasonable to expect his family to commit resources as directed by counsel who were unknown to them until two months ago. The Government proposal to allow "prescreened communications" from Mr. Guzman to his family member appears to preclude delivering a personal letter that could provide his family some assurance of his wishes; the Government makes clear that it "continues to object to allowing direct communication between the defendant and Ms. Coronel." (*Id.* at 31). Without this direct communication, Mr. Guzman's right to counsel will continue to be frustrated.

The SAMs were obviously written in anticipation of Mr. Guzman being allowed to visit with family members and also to speak with them on the telephone. (*See* SAMs § 3). In fact, all SAMs begin from the same template which permits telephonic contact with immediate family members and there is a presumption that immediate family members will have the ability to have telephone contact with the accused.[15] These calls and visits are limited in number and subject to strict monitoring by government officials. Any phone call between Mr. Guzman and a family member must be contemporaneously monitored and recorded. (SAMs § 3(d)). If any "inappropriate activity" is revealed, the call may be immediately terminated. (SAMs § 3(e)). Similarly, all face to face visits may be contemporaneously monitored and cannot involve any physical contact. (SAMs § 3(f)(iii)(1)). These conditions are more than adequate to address the Government's professed concern that Mr. Guzman could pass "forbidden messages . . . to third parties." (Govt. Memo. 21).

The Government's worry that Mr. Guzman could use a code to deliver "dangerous" messages if he is allowed to meet with his wife is based on complete conjecture. The Government provides no evidence that Mr. Guzman or Ms. Coronel have ever used coded communication. The cases cited by the Government on this point are unpersuasive; none involved communications made while under strict monitoring conditions like those imposed by the SAMs in this case. *See, e.g. Basciano v. Lindsay*, 530 F. Supp. 2d 435, 440 (E.D.N.Y. 2008) (SAMs imposed on defendant only after allegation that he tried to procure murder of five people, including the judge and prosecutor. Defendant was still allowed visits with his family). The point is not that the Government has to "wait for [a person] to undertake . . . violent actions in order to justify SAMs" (Govt. Memo 35), the point is that the SAMs provide sufficient assurance, through its recording and monitoring provisions, that Mr. Guzman could not pass "dangerous" messages if allowed to speak with his wife.

To retain counsel of his choice, Mr. Guzman is necessarily going to have communicate personally with his wife. Third party messages relayed by appointed or private counsel cannot provide Ms. Coronel the assurance she needs that, by hiring a particular attorney, she is fulfilling her husband's wishes. Without some personal communication with his wife, Mr. Guzman's fundamental right "to secure counsel of his own choice" will be defeated. *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); *Luis v. United States*, 136 S. Ct. 1083, 1089 (2016).

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[15] *See Mohammed v. Holder*, 47 F. Supp. 3d 1236, 1252 (D. Colo. 2014)

The Government's proposed modification results in a Hobson's choice. In order to exercise his Sixth Amendment right to counsel of his choice, the Government requires Mr. Guzman to give up his Fifth Amendment right against self-incrimination. The Government's proposed modification allows the Government not only the right to review any communication between Mr. Guzman and his family members, but, implicitly, the right to retain those communications. The Government has not proposed any limitation on the manner in which it may seek to use the contents of these communications in the future. There is nothing to prevent the Government from attempting to use these recorded communications to bring new charges, or as evidence in against Mr. Guzman in the instant prosecution. For example, the Government may allege that any large sum of money possessed by Mr. Guzman's family or friends must be "Sinaloa cartel" proceeds, or their willingness to pay for Mr. Guzman's defense says something about the nature of the alleged criminal enterprise. *See United States v. Simmons*, 923 F.2d 934, 949 (2d Cir. 1991) (*Citing In re Shargel,* 742 F.2d 61, 64 (2d Cir.1984)) ("payment of attorneys' fees by one individual on behalf of other suspected members of a criminal enterprise 'may imply facts about a prior or present relationship' between the benefactor and his beneficiaries.")

Mr. Guzman's situation is distinguishable from the line of cases holding that as a general rule, a client's identity and fee information are not privileged and attorneys must disclose such fees for tax purposes. *See Lefcourt v. United States*, 125 F.3d 79, 86 (2d Cir. 1997) (*Citations omitted.*) *cert. denied,* 524 U.S. 937 (1998). The Government's proposal would grant them access to information about Mr. Guzman's relationship to third parties and their sources of income, even if the communications never result in an attorney being hired. Further, Mr. Guzman is not claiming that disclosure is impermissible because it would violate attorney-client privilege, but rather that he is being forced to choose between asserting his Sixth Amendment right to counsel of his choice and his Fifth Amendment right against self-incrimination and such a choice is, by its nature, unconstitutional.

D. Due Process

Under the Fifth Amendment's Due Process Clause, a defendant may not be punished prior to a finding of guilt in accordance with due process of law. *See generally, Bell v. Wolfish*, 441 U.S. 520 (1979). While the Eighth Amendment's prohibition of "cruel and unusual" punishment does not apply to detainees not convicted of a crime, 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. 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.") Thus, 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.").

Here, the Government's assertion that the oppressive nature of Mr. Guzman's confinement is reasonably related to a legitimate governmental purpose is belied by the arbitrary nature of the conditions. For example, Mr. Guzman was allowed to purchase a clock from the commissary. The clock was later taken away by BOP officials. The Government does not dispute these facts and, indeed, offers no explanation for the series of events. Similarly, Mr. Guzman's "recreation" time is arbitrarily limited to one hour per weekday and the Government asks the defense and the Court to accept this limitation at face value. The Government seeks the power to censor which books Mr. Guzman may read? If these conditions are not imposed to punish Mr. Guzman, why can't he have a clock in his cell? Why can't he use the exercise equipment two hours per day instead of one? Why can't he purchase bottled water from the commissary? Why can't he choose which books he wants to read? None of these conditions relate at all to the Government's expressed concern about Mr. Guzman passing "dangerous" messages to third parties. The inescapable conclusion must be that the Government seeks to make Mr. Guzman's detention as difficult and unpleasant as possible. That is the hallmark of punishment.

The specific conditions noted above should not be taken by the Court as a list of conditions that could be modified to save the SAMs from violating Mr. Guzman's constitutional rights. The listed conditions are simply some of the many which evidence the arbitrary and—because they are arbitrary—punitive quality of Mr. Guzman's confinement. Yes, drinking from the tap won't make Mr. Guzman more susceptible to solitary confinement-induced mental illness, but the lack of a rational explanation for requiring to drink tap water proves that the Government's goal here is punishment.

Under the SAMs as presently applied, Mr. Guzman faces an indeterminate amount of time in solitary confinement. The vast amount of discovery the Government says it will turn over in addition to the nature of the charges offenses mean that Mr. Guzman will potentially be in pretrial detention for years. The extreme deprivations presently imposed on him will have dire impacts on his mental and physical health, especially considering "that researchers have found that even *a few days* in solitary confinement can cause cognitive disturbances." *Williams v. Sec'y Pennsylvania Dep't of Corr.*, 848 F.3d 549, 562 (3d Cir. 2017)(emphasis in original). The severe nature of the confinement conditions imposed in this case, by themselves, violate the Due Process Clause. That the conditions are not warranted by any legitimate governmental interest only makes that violation more acute.

E. <u>Right to present a defense</u>

The impact of the SAMs on Mr. Guzman's physical and mental well-being is important not only because it evidences the punitive nature of his conditions of confinement, but because it impairs his Sixth Amendment right to present a defense. As Mr. Guzman's mental and physical states deteriorate under the SAMs, his ability to assist in his defense will be crippled. It is a common phenomenon that detainees held under SAMs similar to those in this case become mired in thoughts and litigation regarding their conditions of confinement and lose the ability to focus on the criminal proceeding. "The SAMs [] distract a defendant from the case's substance and prevent the accused from concentrating on how to best challenge the indictment, which may include preparing the defendant to testify at trial, a task requiring 'an extraordinary amount of time and attentiveness.'" Andrew Dalack, *Special Administrative Measures and the War on Terror: When Do Extreme Pretrial Detention Measures Offend the Constitution?*, 19 Mich. J. Race & L. 415, 434 (2014) (*citations omitted).*

"The defendant's isolation only makes matters worse: '[s]ince the attorney is the only person with whom the client has contact, the attorney is the only outlet for the client's frustration.' If this itself does not create tension between the defendant and his attorney, the attorney's failure to substantively improve the defendant's confinement conditions 'can be met with animosity and resistance to discussing anything else,' depriving the defendant the benefit of his own assistance." In one terrorism case, although the defendant never expressed distrust towards his attorney, he simply withdrew from the entire case and "lost affect." *Id.*

Further, the severe limitations on Mr. Guzman's non-legal contacts violate his right to present a defense and investigate his case. The Government alleges that this restriction is necessary to protect the safety of its witnesses. But this limitation renders it completely impossible for defense counsel to locate, interview and secure witnesses necessary for Mr. Guzman's defense. Most of the witnesses to the events alleged in the indictment will be located in foreign countries and may be skeptical of foreigners they have never met coming to speak to them, claiming to be assisting in Mr. Guzman's defense. In many cases, defense counsel must rely on their client's assurances to potential witness that they would like the witness to cooperate with the defense team before a witness will do so. By preventing even this innocuous communication—that it is okay for the witness to speak to Mr. Guzman's attorneys—the SAMs completely prevent Mr. Guzman from facilitating his counsel's investigation in this manner.

F. <u>SAMs are unwarranted</u>

Despite protestations to the contrary the Government has not demonstrated that SAMs are warranted in this case. Pursuant to 28 C.F.R. §501.3, SAMs may be warranted if they are reasonably necessary to protect against "the risk of 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. The Government has sought to justify the imposition of SAMs against Mr. Guzman based in part on his alleged history of escaping from prison in Mexico. These allegations, while sensational, do not provide a proper justification for the imposition of SAMs. Neither of the two incidents of escape described by the Government are alleged to have involve acts of violence or threats of violence. Nor has the Government alleged that Mr. Guzman's prior reputed escapes from incarceration resulted in destruction of physical property creating a "risk of death or serious bodily injury" as required under 28 U.S.C. §501.3. It can only be assumed that these alleged incidents, the sensational nature of which has been greeted with widespread skepticism, are yet further examples of the Government relying on myth and legend rather than facts to prosecute its case.

Further, regarding acts of violence alleged to have been perpetrated by Mr. Guzman, the Government has offered only sweeping generalizations in the documents filed on the public docket. While the Government claims it has provided ample documentation in its *ex Parte* filings, Mr. Guzman is obviously not in position to controvert allegations he has been unable to see. Surely our system of law does not countenance that the drastic deprivations imposed on Mr. Guzman may be instituted based on secret allegations Mr. Guzman is powerless to challenge. Mr. Guzman has demonstrated that the SAMs burden his constitutional rights under the First, Fifth and Sixth

Amendment. Upholding their imposition without giving Mr. Guzman the opportunity to challenge the Government's allegations further violated his right to Due Process under the Fifth Amendment.

G. First Amendment and right to an impartial jury

It is well established that detainees retain First Amendment rights, including the right to send and receive mail. *Mohammed v. Holder*, 2011 WL 4501959, at *7 (D. Colo. Sept. 29, 2011). Any infringement of Mr. Guzman's First Amendment rights of free speech and association are only lawful if they are reasonably related to legitimate governmental interests. *Turner v. Safley,* 482 U.S. 78, 89 (1987). The Sixth Amendment secures to criminal defendants the right to trial by an impartial jury. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Sensational and prejudicial pretrial publicity often results in a jury panel denuded of its impartiality. *See e.g. Skilling v. United States*, 561 U.S. 358, 378 (2010); *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966); *Irvin* at 719.

The SAMs prohibition on Mr. Guzman communicating with news media in any way violates both his First Amendment right to free speech and his Sixth Amendment right to trial by an impartial jury. The Government's argument that defense counsel "possess the ability to correct any purported 'false' accounts of his life to the public" is simply wrong.[16] Defense counsel are bound by this Court's local rules, which prohibit publicly disseminating "[a]ny opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case." U.S. Dist. Ct. Crim. R. S. & E.D.N.Y. 23.1(d)(7)("Local Rule 23.1"). In fact, defense counsel are prohibited from responding to the countless media reports about Mr. Guzman and this prosecution. While the Government attorneys are bound by the same rule, "retired" government officials are not.[17]

The SAMs, therefore, leave Mr. Guzman and the defense team mute in the face of "former" law enforcement officials appearing in the media and publishing books purporting to reveal the truth about Mr. Guzman. The SAMs also prohibit Mr. Guzman from responding to the numerous thinly-disguised fictional accounts of his life produced for television or to be produced as major motion pictures.

The intense international media scrutiny of this case risks prejudicing prospective jurors. The SAMs compound this prejudice by ensuring that Mr. Guzman has no way to counter false and unfavorable media reports or fictionalized accounts of his life.[18] Because of this media interest (fed

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[16] The Government's contention that defense counsel's public filings and brief comments to the press after Mr. Guzman's court appearances are sufficient to combat the onslaught of media portrayals of Mr. Guzman's life is also misguided. In all its interactions with the press, the defense has been guided by Local Rule 23.1.

[17] As noted in our letter of March 13, 2017, the press conference held by the Unites States Attorney on the date of Mr. Guzman's arraignment likely violated the spirit, and perhaps even the letter, of Local Rule 23.1.

[18] The Government claims that Mr. Guzman has cultivated and perpetuated the image of himself as a narcotics trafficker. (Govt. Memo. 36). To support this claim, the Government quotes an article in

at least partially by the Government) the prohibition on Mr. Guzman speaking to the media violates his First Amendment right to free speech and his Sixth Amendment right to an impartial jury.

The SAMs limitation on religious services available to Mr. Guzman burden his First Amendment right to the free exercise of religion. To this day, Mr. Guzman has yet to see a priest at the MCC who speaks Spanish. Any interaction he has with "religious personnel" has either been through pantomime or with the "assistance" of a prison guard who speaks Spanish. This situation, along with the SAMs bar on group religious observances, unduly encumber Mr. Guzman's right to the free exercise of his religion.

III. CONCLUSION

We respectfully request that the Court grant the proposed immediate modifications permitting 1) Mr. Guzman to have direct contact with his wife, Emma Coronel, either in person or by telephone, for the purposes of communicating his choice of private counsel and determining the availability of assets necessary to retain such counsel; and 2) allowing defense counsel or private attorneys to relay messages between Mr. Guzman and third parties for the limited purposes of ascertaining and securing the assets necessary to retain counsel—without disclosing the contents of these messages to the Government.

We further request that the Court vacate the SAMs in full, release Mr. Guzman from the SHU, 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 and/or modify various sections and provisions of the SAMs. Further, if the Court is not prepared to grant the relief herein requested, the defendant requests an evidentiary hearing pursuant to *Turner v. Safley*, 482 U.S. 78 (1987).

Finally, we request that the Court to sign the attached proposed order which will allow a researcher from Amnesty International USA to visit 10 South at MCC to investigate the conditions of Mr. Guzman's confinement.

Rolling Stone by the "journalist" Sean Penn. *Id.* According to the cited article, Mr. Guzman had never before given an interview or spoken publically about his life. *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 29, 2017). As for the alleged direct quote provided by Mr. Penn, the article relates that Mr. Guzman spoke in Spanish, and that Mr. Penn described his facility with that language as follows: "I'm pretty restricted to hola and adios." *Id.* The actress Kate Castillo is alleged to have served as a translator. Mr. Penn also described that, during the "interview" both he and Ms. Castillo were drinking the brand of Tequila Ms. Castillo hawks.

Thank you for your attention to these matters.

Respectfully submitted,

/s/

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

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

AMNESTY INTERNATIONAL

Andrea Goldbarg
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28 March 2017

Dear Assistant US Attorney Andrea Goldbarg.

CONDITIONS OF DETENTION OF JOAQUIN ARCHIVALD GUZMAN LOERA AND GENERAL CONCERNS ABOUT SAMS

I am writing to express Amnesty International USA's concern about the conditions under which Joaquin Guzman Loera has been held while in federal pre-trial detention and to request access to the Metropolitan Correctional Center.

We are informed that, throughout the nearly three months of his pre-trial detention, Mr. Guzman Loera has been held in solitary confinement in the Special Housing Unit (SHU) of the Metropolitan Correctional Center (MCC) in New York which is in the 10 South wing of the facility, where he currently remains. The lights in the SHU are kept on 24 hours a day. He is reportedly confined for 23 hours a day to a cell, with only one hour of daily exercise in a small, interior cage which gives no access to fresh air or sunlight. On weekends, he is not allowed any exercise and is confined 24 hours a day. He is allowed only visits with his attorneys and has not been granted a visit by his wife since his extradition to the USA. While we understand that currently he is receiving legal visits lasting between 4 to 5 hours a day to ameliorate this problem, we have been informed that this level of staffing by his legal team will be impossible to maintain. He is authorized to make phone calls to his family at "a minimum of one phone call per month", however he has not been afforded this privilege and at this point, his wife, who we understand is the only immediate family member likely to be able to visit, has been restricted from visiting him in detention. His meals are passed through a slot in the door of his cell, where he eats alone. He is also subjected to 24-hour electronic monitoring in the SHU, both inside and outside his cell, including when he is showering or going to the toilet. Further to this, very few of the guards or prison staff with access to the SHU speak Spanish, causing his further isolation. While held in isolation in Mexico awaiting extradition to the USA, it is reported that Mr. Guzman Loera was still provided access to his family without incident.

We understand that beyond his solitary confinement, the above conditions (among others) have been applied to Mr. Guzman Loera's detention pursuant to "special administrative measures" (SAMs). Amnesty International USA has previously written to the US Government in regards to the isolation and imposition of SAMs on pre-trial detainees.[i]

Amnesty International USA recognizes that the authorities have an obligation to take protective security measures to the extent necessary. However, we are concerned that the conditions imposed on Mr. Guzman Loera appear to be unnecessarily harsh and to breach international standards for humane treatment. Some of the conditions, such as the lack of outdoor exercise, directly contravene the United Nations (UN) Standard Minimum Rules for the Treatment of Prisoners.

There is a considerable body of evidence in the USA and elsewhere, that prolonged isolation can cause serious psychological and physical harm, particularly if accompanied by other deprivations such as lack of information about the outside world, confinement to an enclosed space and inadequate exercise. The Human Rights Committee, which monitors states' compliance with the International Covenant on Civil and Political Rights (ICCPR), has noted that prolonged solitary confinement may amount to torture or other ill-treatment prohibited under Article 7 of the treaty. It has also emphasized that the requirement under Article 10 to treat all persons deprived of their liberty with humanity and respect for their dignity is a "fundamental and universally applicable rule".[ii]

Although we have general concerns about conditions such as those described above, these concerns are heightened in the case of pre-trial detainees, where the risk of mental impairment brought on by prolonged isolation might in certain circumstances impact on a prisoner's ability to assist in his or her defence and thus the right to a fair trial.

Recent reports suggest that Mr. Guzman has difficulty breathing and suffers from a sore throat and headaches due to his conditions of confinement. He has also complained that the air conditioning in the SHU is kept at extremely cold levels, to the point where he is left shivering, and without proper clothing to stay warm.

In furtherance of the recent reports in the case of Mr. Guzman Loera and by previous attorneys who had clients held in the SHU, Amnesty International USA is requesting access to 10 South of the MCC in order to observe the conditions of the SHU and to interview Mr. Guzman Loera regarding the impact of his conditions of confinement and the imposition of SAMs are having on his health and well-being.

We thank you for your consideration of this request and look forward to your reply.

Respectfully,

Justin Mazzola
Deputy Director of Research
Amnesty International USA

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[i] See, Amnesty International letter to Attorney General Holder, Re: Conditions of Detention of Syed Fahad Hashmi and General Concerns about SAMs, 29 April 2010, AMR 51/2010/042; Amnesty International letter to Attorney General Holder, Re: Special Housing Unit in the Metropolitan Correction Centre, New York, 16 February 2011, AMR 51/2011/27; Amnesty International letter to Attorney General Holder, Re: Syed Fahad Hashmi and Conditions of pre-trial detention, 30 May 2012, AMR 51/012/2012.

[ii] General Comment 21 of the Human Rights Committee on Article 10.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-against- : ORDER

JOAQUIN ARCHIVALDO GUZMAN LOERA, :

09 CR 466 (BMC)

Defendant. :

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IT IS HEREBY ORDERED THAT:

The Bureau of Prisons' Metropolitan Correctional Center is directed to provide, subject to SAMs clearance, supervised access to the Unit 10 South of the MCC to Justin Mazzola, Deputy Director of Research for Amnesty International USA, including but not limited to the cell where Mr. Guzman is currently detained, the recreation room Mr. Guzman is permitted to use, and the counsel visit area. This access includes the ability to observe, document, and photograph the aforementioned areas. Additionally, the Bureau of Prisons is directed to permit Mr. Mazzola to meet with Mr. Guzman in the counsel visit area in the presence of Mr. Guzman's defense counsel.

DATED: BROOKLYN, N.Y.
April ___, 2017

HONORABLE BRIAN M. COGAN
UNITED STATES DISTRICT JUDGE