19-2239

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ARTURO BELTRAN-LEYVA, HECTOR BELTRAN-LEYVA, IGNACIO CORONEL VILLAREAL, AKA EL NACHO, ISMAEL ZAMBADA GARCIA, AKA EL MAYO, AKA MAYO ZAMBADA, AKA DOCTOR, AKA LA DOC, AKA DOCTORA, AKA EL LIC, AKA MIKE, AKA MAYO EL SENOR, AKA ISMAEL ZAMBADA-GARCIA, JESUS ZAMBADA-GARCIA, AKA EL REY,

Defendants,

JOAQUIN ARCHIVALDO GUZMAN LOERA, AKA EL CHAPO, AKA EL RAPIDO, AKA CHAPO GUZMAN, AKA SHORTY, AKA EL SENOR, AKA EL JEFE, AKA NANA, AKA APA, AKA PAPA, AKA INGE, AKA EL VIEJO, AKA JOAQUIN GUZMAN-LOERA

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR DEFENDANT-APPELLANT JOAQUIN ARCHIVALDO GUZMAN LOERA

LAW OFFICE OF MARC FERNICH
800 Third Avenue, 18th Floor
New York, New York 10022
(212) 446-2346

Counsel for Defendant-Appellant
Joaquin Archivaldo Guzman Loera

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

REGULATIONS

CONSTITUTIONAL PROVISIONS

Other Authorities

STATEMENT

Confronting a high-value target like Joaquin "El Chapo" Guzman – arguably the World's Most Wanted Man, convicted in the court of public opinion long before he was formally arrested, charged or tried – even the most fair-minded appellate judge must be tempted to look past any defects in the underlying prosecution and get on with the business of incapacitation.

This presumed impulse, however natural, should be resisted. "A core promise of our criminal justice system is that even the very worst among us deserves to be fairly tried and lawfully punished."[1] And that imperative "cannot be avoided" by "media"-stoked "hysteria over," or "craven fear" around, a particular "individual."[2]

We don't rewrite the rules or throw away the book because the defendant is an arch public enemy. If anything, we enforce them more vigilantly – to subdue popular passions, condemn the scourge of mob justice and extol the supremacy of the rule of law.

---

[1] *See U.S. v. Tsarnaev*, 968 F.3d 24, 35 (CA1 2020).

[2] *Boudin v. Thomas*, 533 F. Supp. 786, 787 (S.D.N.Y. 1982) (Duffy, J.) .

Chapo Guzman's prosecution was marred by rampant excess and overreach, both governmental and judicial – needless resorts if he was really the kingpin extraordinaire his adversaries insisted. If we are to vindicate the preceding maxims and redeem our justice system's promise – if they are to mean something more than empty sloganeering – its result cannot be tolerated.

QUESTIONS PRESENTED & REVIEW STANDARDS

1. Does a foreign national have individual standing to challenge the validity of a post-extradition rule of specialty waiver – allegedly procured through American fraud – granted by his native country?

Prudential standing in this area is a legal issue reviewed *de novo*.[3]

2. Did the district court impermissibly impair Guzman's ability to mount a vigorous defense with the assistance of counsel, denying him due process and a fair trial, by saddling him with an extraordinary and unprecedented set of overlapping pretrial restraints – including two-and-a-half years of punishing solitary confinement prior to conviction; a draconian protective order substantially inhibiting meaningful

[3] *U.S. v. Barinas*, 865 F.3d 99, 104 (CA2 2017).

investigation and preparation; delayed and withheld access to material information and evidence; and excessive ex parte practice – representing a grossly exaggerated response to any security issues this case presented?

This question raises multiple sub-issues reviewed under shifting standards. The constitutionality of pretrial confinement conditions, and any supporting factual determinations, are subject to *de novo* and clear error review, respectively.[4] Protective orders issued under Fed. R. Crim. P. 16 and the Classified Information Procedures Act are reviewed for abuse of discretion.[5] Whether excessive ex parte practice rises to a denial of procedural due process is a legal question reviewed *de novo*.[6] Ultimately, whether all these hindrances in concert violated Guzman's Fifth and Sixth Amendment rights to due process, counsel, defense and fair trial turns on constitutional interpretation and application, an issue of law reviewed *de novo*.[7]

---

[4] *U.S. v. El-Hage*, 213 F.3d 74, 79 (CA2 2000).

[5] *U.S. v. Aref*, 533 F.3d 72, 80 (CA2 2008).

[6] *U.S. v. Abuhamra*, 389 F.3d 309, 318 (CA2 2004) (citation omitted).

[7] *Ante* n.4.

3. Was the government improperly allowed to plead and prove as a standalone continuing criminal enterprise violation – and to introduce evidence of 26 graphically prejudicial murder conspiracies in support – predicate activity lacking any practical capacity to increase the maximum or minimum penalties Guzman faced?

Whether an indictment charges a cognizable crime, a matter of statutory interpretation, is a question of law reviewed *de novo*.[8]

4. Did the inability of the pertinent prosecution witness to explain the provenance of damaging foreign recorded evidence – and the government's failure to do so otherwise – render its acquisition a *per se* unreasonable search and seizure violating the Fourth Amendment?

Legal rulings and factual findings on motions to suppress evidence are reviewed *de novo* and for clear error, respectively.[9] To the extent unpreserved, this issue is subject to plain error review.[10] To the extent it

[8] *U.S. v. Marinello*, 839 F.3d 209, 217 (CA2 2016), *reh'g en banc denied*, 855 F.3d 455 (CA2 2017), *rev'd on other grounds*, 138 S. Ct. 1101 (2018).

[9] *See In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 157, 167 (CA2 2008).

[10] *Davis v. U.S.*, 140 S. Ct. 1060, 1061 (2020).

entails ineffective assistance of counsel, Guzman must show deficient performance and consequent prejudice.[11]

5. Did the government unlawfully search and seize domestically stored text messages purporting to inculpate Guzman, violating the Fourth Amendment and Fed. R. Crim. P. 41, where (a) the initial intrusion lacked a warrant and no exception to the warrant requirement applies and (b) warrants for ensuing intrusions exceeded the issuing judges' territorial jurisdiction?

Legal rulings and factual findings on motions to suppress evidence are reviewed *de novo* and for clear error, respectively.[12]

6. Did the district court abuse its discretion and violate Guzman's Fifth and Sixth Amendment rights to cross-examine and defend by a combination of prejudicially erroneous evidentiary rulings resting on misapprehensions of operative legal principles?

---

[11] *Strickland v. Wash.*, 466 U.S. 668 (1984).

[12] *Ante* n.9.

Evidentiary rulings are generally reviewed for abuse of discretion.[13] A district court abuses its discretion when it makes an error of law.[14] Evidentiary restrictions impacting constitutional rights, like those of confrontation and defense, are reviewed *de novo*.[15]

7. Did the district court's failure to examine a *per se* conflict of interest publicly attributed to lead defense counsel – involving putative participation in criminal activity related to the pending charges – deprive Guzman of counsel's assistance in violation of the Sixth Amendment?

A lawyer suffers a disqualifying conflict of interest, with reversal mandated in its absence, when implicated in criminal activity related to the charges against his client.[16] The trial court has an independent duty to inquire when it knows or should know a conflict exists.[17]

8. Did the district court unconstitutionally preclude Guzman's government bias defense, bottomed on trial evidence and keyed to specific

---

[13] *U.S. v. Al-Farekh*, 956 F.3d 99, 114 & n.53 (CA2 2020).

[14] *U.S. v. Dupree*, 706 F.3d 131, 135 (CA2 2013).

[15] *Al-Farekh*, 956 F.3d at 114 & n.55.

[16] *U.S. v. Triana*, 205 F.3d 36, 42 (CA2 2000).

[17] *Mickens v. Taylor*, 535 U.S. 162, 168-69 (2002).

record references, discrediting the investigation's bona fides and assailing the decision to charge him?

The district court precluded Guzman's government bias defense by evidentiary, cross-examination and argument restrictions and a wayward jury instruction.

Evidentiary rulings are generally reviewed for abuse of discretion.[18] A district court abuses its discretion when it makes an error of law.[19] Evidentiary limitations affecting constitutional rights, like those of confrontation and defense, are reviewed *de novo*.[20]

A jury instruction's propriety is also reviewed *de novo*.[21] The ultimate question – whether all the impediments together violated Guzman's Fifth and Sixth Amendment right to present a complete defense – is likewise subject to *de novo* review.[22]

---

[18] *Ante* n.13.

[19] *Ibid.* n.14.

[20] *Ibid.* n.15.

[21] *U.S. v. Grote*, 961 F.3d 105, 114 (CA2 2020).

[22] *Ante* n.4.

9. In a published report released days after the verdict, a juror volunteered that they and several others had (a) violated their oath and instructions throughout Guzman's trial by closely following and regularly discussing the case's unprecedented media coverage and (b) colluded to cover up their misconduct by deliberately lying to the court when queried on the subject. Among the items the jurors consulted and discussed were stories detailing allegations, ruled too prejudicial to admit as evidence at trial, that Guzman had drugged and raped underage girls.

Did the district court reversibly err in refusing to investigate these revelations – impugning the jurors' fitness to serve and undermining the trial's structural integrity and reliability – and denying Guzman's resulting retrial motion summarily?

The Court reviews this issue for abuse of discretion.[23]

10. Should the Court remand this matter to another district judge to investigate information appearing to implicate the prosecution and trial court in improper ex parte communications, an undisclosed shadow

[23] *U.S. v. Stewart*, 433 F.3d 273, 295 (CA2 2006).

counsel arrangement and conducting private judicial proceedings with Guzman absent his counsel of record?

When an appellant asserts a claim based on extra-record information, the Court may abstain pending collateral or Fed. R. Crim. P. 33 proceedings, remand for factfinding or decide the claim on the existing record.[24]

BACKGROUND

Guzman appeals[25] a Brooklyn federal judgment[26] convicting him, after extradition from Mexico and a three-month jury trial before Judge Cogan, on a 10-count indictment charging continuing criminal enterprise, drug manufacturing, importation and distribution, and firearm and money laundering conspiracy offenses.[27]

The evidence at trial, whose legal sufficiency is not contested, permitted a rational jury to conclude that Guzman played a leading role in the Sinaloa Cartel, a group billed as the world's largest and most

---

[24] *U.S. v. Brown*, 623 F.3d 104, 112-13 (CA2 2010).

[25] A: 604.

[26] A: 599.

[27] A: 55.

powerful narcotics trafficking organization. In that capacity, the government alleged, Guzman and others arranged and supervised shipments of vast quantities of cocaine, heroin, methamphetamine and marijuana to the United States and elsewhere over a 25-year period. Among its methods of operation, the Sinaloa Cartel allegedly employed widespread violence and systematic corruption of foreign officials, some of it purportedly committed or ordered by Guzman.

The government's case centered on testimony from 14 unsavory accomplice witnesses cooperating with authorities in hopes of lenient treatment.[28] It was rounded out by audio, visual, digital, documentary and physical evidence, and capped off with testimony from experts and law enforcement agents.[29] But the cooperators, baggage and all, were the undisputed stars of the show.[30]

Guzman defended by attacking the cooperators' credibility, highlighting their motive to shift blame to him to save themselves.

---

[28] *U.S. v. Guzman Loera*, 09-cr-0466 (BMC), 2019 WL 2869081, at *1, *15 (Jul. 3, 2019).

[29] *Ibid.*

[30] *See*, *e.g.*, ECF 275 at 8-8 (7/30/18); A: 447.

Defense counsel also argued – via cross-examination and summation – that absent codefendant Mayo Zambada, still at large in Mexico, had bribed Mexican officials to target and frame the flamboyant Guzman so Zambada could avoid arrest and continue to run the cartel from the shadows. According to Guzman, the Zambada family achieved that goal in part by offering up Mayo's brother and son – who testified against Guzman as cooperators in anticipation of light sentences and for other benefits received – as token sacrifices. Finally, the defense stressed Guzman's spartan living conditions and his racking up $20 million in debt from 2007-13,[31] factors belying drug lord status.

Judge Cogan sentenced Guzman principally to multiple life terms and ordered him to forfeit nearly $13 billion.[32] Additional facts are discussed as relevant to our legal arguments.

[31] T. 6442-43.

[32] *Ante* n.2.

ARGUMENT SUMMARY

Guzman's arguments proceed in three distinct phases arranged chronologically.

Pretrial Issues

POINT I challenges a district court determination that Guzman lacked standing to contest, as tainted by fraud on the part of American authorities, a post-extradition rule of specialty waiver obtained from Mexico that allowed prosecution in Brooklyn instead of Texas or California, as stipulated in the extradition request and decree. Guzman argues that a precedent of this Court holding that only the surrendering state – and not an aggrieved individual – can assert a rule of specialty violation is wrongly decided, conflicts with Supreme Court authority and doesn't apply to specialty *waivers*, particularly when attacked as illicitly induced.

POINT II argues that an extraordinary and unprecedented set of redundant pretrial encumbrances – including two-and-a-half years of punishing solitary confinement prior to conviction; a dragnet protective order substantially inhibiting meaningful investigation and preparation; delayed and withheld access to material information and evidence; and

excessive ex parte practice – was a vast overreaction to any security issues this case presented. Viewed in conjunction, the obstacles deprived Guzman of due process, constructively denied him counsel and a defense, and made a fair trial impossible.

POINT III argues that in the circumstances at hand, a predicate CCE violation charging 26 murder conspiracies was improperly included in the indictment and presented to the jury because it couldn't increase Guzman's maximum or minimum sentencing exposure as a functional matter. Inordinate evidence of graphic violence admitted in support of the invalid charge wrought immense prejudice – both on its own and by its effect on the Fed. R. Evid. 403 calculus for other discretionary evidentiary rulings.

POINTs **IV** and **V** challenge the government's acquisition of foreign and domestic evidence – inculpatory phone conversations and text messages – as the product of unlawful searches and seizures violating the Fourth Amendment and Fed. R. Crim. P. 41. Among his objections, Guzman complains that Manhattan federal warrants for electronic data stored in Washington State exceeded the issuing courts' territorial jurisdiction.

Trial Issues

POINT VI attacks a cluster of prejudicially erroneous evidentiary rulings – collectively infringing Guzman's rights to cross-examine and defend – claiming they deserve no deference because founded on misapprehensions of controlling legal principles.

POINT VII faults the district court for eschewing inquiry or investigation as to published reports appearing to implicate lead defense counsel in criminal activity sufficiently related to the charges to create a *per se* conflict of interest requiring automatic reversal, without a showing of concrete harm or adverse effect.

POINT VIII argues that the court erred in precluding Guzman's government bias defense attacking the investigation's caliber and integrity and assailing the decision to indict – a common and legitimate trial tactic recognized and endorsed by the Supreme Court.

Post-Trial Issues

In a published report released days after the verdict, a juror volunteered that they and several others had (a) violated their oath and instructions throughout Guzman's trial by closely following and regularly discussing the case's unprecedented media coverage and (b) colluded to

cover up their misconduct by deliberately lying to the court when queried on the subject. Among the items the jurors consulted and discussed were stories detailing allegations, ruled too prejudicial to admit as evidence at trial, that Guzman had drugged and raped underage girls. **POINT IX** argues that these revelations – impugning the jurors' fitness to serve and undermining the trial's structural integrity and reliability – require exploration through an evidentiary hearing or a new trial. Guzman further contends that the district court reversibly erred in denying relief summarily, without inquiry or investigation.

Finally, **POINT X** seeks remand to another district judge to investigate information appearing to implicate the prosecution and trial court in improper ex parte communications, an undisclosed shadow counsel arrangement and conducting private judicial proceedings with Guzman absent his counsel of record.

ARGUMENT

POINT I

THE DISTRICT COURT WRONGLY DENIED GUZMAN'S MOTION TO DISMISS – ALLEGING SPECIALTY VIOLATIONS IN HIS EXTRADITION FROM MEXICO – FOR LACK OF STANDING

Though tried on Brooklyn federal charges, Guzman was extradited to Western Texas and Southern California, to face indictments pending against him in those judicial districts.[33] Upon his transfer to America, the government sought and gained Mexico's after-the-fact consent to prosecute Guzman under a different indictment in Brooklyn.[34]

Guzman moved to dismiss the Brooklyn indictment, arguing that his prosecution there violated the rule of specialty as incorporated in the operative extradition treaty between the U.S. and Mexico. Specialty is an international law doctrine holding that "a person can be tried only for the crime for which he ha[s] been extradited."[35] The applicable U.S.-Mexico

[33] ECF 110 at 2-3 (8/3/17).

[34] *Ibid.* 10-13.

[35] *U.*S. v. *Alvarez-Machain*, 504 U.S. 655, 676 n.17 (1992) (Stevens, Blackmun and O'Connor, JJ., dissenting).

extradition treaty contains an express provision tracking the rule, stating: "A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which the extradition has been granted" – unless the "requested Party" consents.[36]

As part of its specialty challenge, Guzman's dismissal motion also accused the government of fraudulently procuring Mexico's consent to waive the rule – by knowing and material misrepresentations and omissions in the underlying extradition papers and possibly the waiver request itself.[37] To the latter end, Guzman noted, the district court had allowed the government to withhold production of the documents presented to Mexico in support of the waiver request, preventing the defense from scrutinizing or contesting their veracity.[38]

The district court denied dismissal on procedural grounds without reaching the merits of Guzman's claims. In a four-sentence docket entry

[36] ECF 110 at 14-15 (citation omitted).

[37] *Ibid.* 4-10, 22, 25-28.

[38] *Ibid.* 11 n.8, 25, 27; *see also* A: 145-50.

chiefly citing this Court's *Barinas*[39] decision, the district court opined that Guzman "has no standing to raise a Rule of Specialty violation."[40] Absent contrary indication in the text, *Barinas* held, extradition treaties create "rights and obligations between" the contracting nations – not on the part of "private persons" who "may benefit" from their "existence."[41] Individual rights, that is, are generally only "derivative" through the signatory states.[42] Accordingly, "absent protest or objection by the offended sovereign," a defendant lacks standing to assert a specialty "violation."[43] Finding no such "protest or objection by Mexico," and nothing in the operative treaty conferring enforceable rights on individual beneficiaries, Judge Cogan denied dismissal for want of standing.[44]

That ruling was mistaken. **First**, *Barinas* isn't dispositive and doesn't preclude standing here. *Barinas* involved a putative specialty

---

[39] 865 F.3d 99.

[40] A: 10-11 (9/15/17 Docket Entry).

[41] 865 F.3d at 104-05 (citations and internal quotation marks omitted).

[42] *Ibid.* at 105 (citations and internal quotation marks omitted).

[43] *Ibid.*

[44] *Ante* n.40.

violation stemming from the defendant's extradition in the first instance. It didn't address a foreign nation's *waiver* of specialty protection – much less a waiver issued *after* the defendant has been extradited or at the U.S. government's behest. And it certainly didn't purport to hold that a defendant is powerless to challenge the validity of a waiver the U.S. government ostensibly instigated by fraud. If anything, the weight of authority tends in the opposite direction, entertaining individual specialty challenges sounding in illicit issuance or inducement of foreign extradition decrees.[45] Indeed, even Judge Cogan recognized that barring claims like these from court altogether required an "extension" of existing precedent.[46]

Second, even if *Barinas* did foreclose standing, it defies a 134-year-old line of Supreme Court cases instructing that "an individual who is not a party" to a treaty "between the United States and another country" *does*

[45] *E.g.*, *U.S. v. Bout*, 731 F.3d 233, 234 (CA2 2013) (reviewing on merits claim that Thai extradition based on material mistake of fact resulted in specialty violation); *U.S. v. Andonian*, 29 F.3d 1432, 1438 (CA9 1994) (same where government allegedly violated rule by presenting false evidence to Uruguay); *see generally U.S. v. Siriprechapong*, 181 F.R.D. 416, 420 (N.D. Cal. 1998) (recognizing "supervisory power" to "examine claims of fraud, bad faith and perjury" tainting "extradition process" integrity).

[46] A: 146.

have standing to assert a specialty violation[47] – "whether or not" the surrendering state lodges a "protest[.]"[48] Put differently, the accused may raise a self-executing treaty "violation"[49] as a trial "defense,"[50] and a court "*must* enforce"[51] the treaty on an individual's behalf *regardless* of the "offensiveness"[52] of "one nation['s]"[53] practice to the other. Beyond the high court, *Barinas* also confounds a body of sister circuit cases following *Rauscher* in holding that "[a]n extradited person may raise whatever objections the extraditing country is entitled to raise."[54]

---

[47] *Alvarez-Machain*, 504 U.S. at 681 n.26 (dissenting op.) (discussing *U.S. v. Rauscher*, 119 U.S. 407 (1886)).

[48] *Ibid.* at 667 (majority op.).

[49] *Medellin v. Tx.*, 552 U.S. 491, 556 (2008) (Breyer, Souter and Ginsburg, JJ.) (citing *Rauscher*, 119 U.S. at 410-11).

[50] *Ibid.*

[51] *Alvarez-Machain*, 504 U.S. at 667 (emphasis supplied).

[52] *Ibid.*

[53] *Ibid.*

[54] *Andonian*, 29 F.3d at 1435 (citations omitted). *Accord*, *e.g.*, *U.S. v. Thomas*, 322 F. App'x 177, 180 & n.4 (CA3 2009) (embracing "majority" view that defendant has individual standing to invoke rule of specialty); *U.S. v. Levy*, 905 F.2d 326, 328 n.1 (CA10 1990) (finding that individual defendant had standing to mount specialty challenge; *Rauscher* described doctrine as a "right conferred upon persons brought from a foreign country" to this one and "gave extradited defendants a right to claim the rule's protection") (quoting 119 U.S. at 424 and *U.S. v. Vreeken*, 803 F.2d 1085, 1088 (CA10 1986)) (internal quotation marks omitted); *U.S. v. Thirion*, 813 F.2d 146, 151 & n.5 (CA8 1987) (rejecting claim that defendant "lacked standing" to assert

Because it conflicts with abiding Supreme Court law and stakes out a distinct minority position in what other courts have termed a lopsided circuit split,[55] Guzman contends for potential further review that *Barinas* is wrongly decided and should be overturned.[56]

---

specialty violation; extradited individual may lodge any objection rendering country might have raised); *cf. U.S. v. Puentes*, 50 F.3d 1567, 1572, 1575 (CA11 1995) (holding that individual defendant has standing to allege specialty violation – to raise any specialty objection requested nation might have asserted – but opining in dicta that latter's waiving right to object defeats defendant's standing; no suggestion that sending state actually issued any waiver, let alone that U.S. authorities purportedly extracted one by fraud as in this case); *U.S. v. Fontana*, 869 F.3d 464, 468-70 (CA6 2017) (similar); *but see U.S. v. Burke*, 425 F.3d 400, 408 (CA7 2005) (adopting *Barinas*-type approach); *U.S. ex rel. Saroop v. Garcia*, 109 F.3d 165, 168 (CA3 1997) (endorsing *Barinas*-type approach in what *Thomas* (322 F. App'x at 180) and *Fontana* (869 F.3d at 470) respectively called "dicta" and "pure dictum"); *U.S. v. Kaufman*, 874 F.2d 242, 243 (CA5 1989) (deferring to State Dept. view that only "offended nation can complain about purported" specialty "violation") (internal quotation marks omitted).

[55] *E.g.*, *Fontana*, 469 F.3d at 470; *Puentes*, 50 F.3d at 1572 & n.2, 1573-75.

[56] Mr. Guzman personally wants the Court to know this: "There is no application for the Specialty Rule that demonstrates legality. The prosecutor who handled the case did not make a request to the Mexican government through the U.S. embassy in Mexico and certified by a magistrate judge. Therefore, there was never a valid petition of extradition. It was not carried out diplomatically by the U.S. embassy in Mexico, as specified in the extradition treaty between the U.S. and Mexico. Therefore, Guzman's conviction must be revoked and he will have to be prosecuted in the Western District of Texas and/or Southern District of California, the only districts where the United States asked Mexico to extradite him."

POINT II

VASTLY OVERREACTING TO ANY SECURITY RISK PRESENTED, THE DISTRICT COURT SADDLED GUZMAN WITH AN UNPRECEDENTED SET OF PRETRIAL RESTRAINTS – INCLUDING WITHHELD ACCESS TO SUPPOSEDLY CONFIDENTIAL INFORMATION; DEFERRED DISCOVERY AS TO KEY GOVERNMENT WITNESSES; A FLOOD OF SECRET GOVERNMENT COURT FILINGS; OPPRESSIVE "SPECIAL ADMINISTRATIVE MEASURES" AKIN TO SOLITARY CONFINEMENT AND AMOUNTING TO PUNISHMENT WITHOUT TRIAL; AND AN ONEROUS PROTECTIVE ORDER THAT HAMSTRUNG INVESTIGATION AND PREPARATION – THAT COLLECTIVELY THWARTED GUZMAN'S FIFTH AND SIXTH AMENDMENT RIGHTS TO COUNSEL AND A DEFENSE, DENIED HIM DUE AND COMPULSORY PROCESS, AND MADE A FAIR TRIAL IMPOSSIBLE

A. STATEMENT

Chapo Guzman was no ordinary criminal defendant. Reviled and romanticized as a supervillain with a larger than life persona, he had a reputed taste for grisly violence and a reported flair for dramatic escapes. Those outsize attributes – whether actual or mythical, as at least one

government investigator opined[57] – plainly called for *some* enhanced security precautions in prosecuting this case.

Still, it was the government that opted to seek Guzman's extradition and bring him to trial on American soil. And those considered choices entitled Guzman – no less than any other defendant – to the full range of procedural protections that distinguish our justice system from, say, the one commonly ascribed to his homeland. After all, jailhouse "walls do not form a barrier separating … inmates" – however infamous or sensationalized – "from the protections of the Constitution."[58] Among the essential protections detainees continue to enjoy? The promise of due process of law and the right to prepare and present a defense with the assistance of counsel.[59]

But Guzman didn't get the basic constitutional markers accorded other defendants – the vital safeguards that purport to define, elevate and set us apart. At the time of his prosecution, Guzman was 60 years old, stood 5'4" tall and was stashed in an "isolat[ed]" unit within

[57] *E.g.*, T. 583-84, 602.

[58] *Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974).

[59] U.S. Const. amends. V, VI.

Manhattan's notoriously harsh federal lockup, the Metropolitan Correctional Center – a far cry from the corrupt Mexican jails he allegedly bribed and contrived his way out of some years earlier.[60] That appraisal came from a veteran chief U.S. magistrate judge, Brooklyn's Roanne Mann, whom Judge Cogan tapped to examine Guzman's confinement conditions and who endorsed, after an onsite tour, his receiving contact visits with counsel. Indeed, even Judge Cogan – who went to surprising lengths to spurn his colleague's recommendation[61] – allowed that Guzman behaved in "exemplary" fashion and "displayed considerable grace under pressure" in the face of "difficult proceedings" and stringent detention terms.[62] Under these circumstances, as Judge Mann sensibly concluded, it was "not reasonable to infer that [Guzman]

[60] ECF 17 at 11 (1/20/17); *id.* 50 at 17 (3/13/17); *id.* 52 at 8 (3/21/17); A: 173-74 n.17; A: 88; T. 5515, 5532, 5541, 5990. This Court has described 10 South, the segregated MCC floor ensconcing Guzman, as "the most secure housing unit at any Bureau of Prisons … facility in the New York City Metropolitan Area." *In re Basciano*, 542 F.3d 950, 953 n.1 (CA2 2008) ("*Basciano III*") (citation and internal quotation marks omitted).

[61] A: 177.

[62] A: 453.

pose[d] the same level of security and escape risks as when he was held in Mexican prisons."[63]

Yet despite those stark realities, the prosecutors and presiding judge seized on what security challenges did exist, treating them as an invitation to suspend Guzman's constitutional rights and effectively preordain conviction. More pointedly, the government, buoyed by the district court, exploited its professed security concerns for tactical gain, using them as a license to pile on one excessive and increasingly overreaching constraint after another — an approach that should've been unnecessary if Guzman truly was the monster the government took him for. Topping the list:

- Blanket denial of access – save "summary substitutions" crafted by the prosecution – to unspecified "materials" the government unilaterally designated "classified information" implicating "national security."[64] Though potentially "helpful [and] material" to Guzman's "defense," the information was withheld upon secret government filings the defense never got to see or contest and a private court review in which it could not participate.[65]

[63] A: 173-74 n.17.

[64] *E.g.*, A: 198.

[65] A: 200.

- A wave of additional secret submissions – similarly asserting unspecified safety concerns, again eluding adversarial scrutiny – by which the government drastically curtailed Guzman's substantive rights.[66] Most notably, the secret submissions helped spur rulings (1) encumbering him with an anonymous and partially sequestered jury;[67] (2) authorizing the government to hold back troves of otherwise discoverable evidence – including thousands of pages of documents, dozens of recordings and more voluminous Rule 16[68] and Jencks[69] material – until shortly before the affected witnesses testified,[70] impairing effective investigation, development and use; and (3) severely constricting cross-examination of the cooperating witnesses[71] comprising the case's crux,[72] thus transforming purported safety considerations into both prosecutorial sword and shield.

- Extreme "special administrative measures" – also premised largely on incontestable *ex parte* filings – that the district court itself equated to "solitary confinement" and admittedly banned an overwhelming majority of "communication" and "visit[ation]."[73] Most debilitating,

---

[66] *E.g.*, A: 136.

[67] *E.g.*, A: 188, 192.

[68] Fed. R. Crim. P. 16.

[69] The Jencks Act, 18 U.S.C. § 3500.

[70] *E.g.*, 8/14/18 Tr. 5-9; A: 183, 196, 205-06; ECF 275 at 5-6 n.1 (7/30/18); *id.* 294 (8/24/18).

[71] *E.g.*, A: 425-26, 438-40.

[72] *E.g.*, ECF 275 at 8-9; A: 447 ("significant portion of [government's] case … consist[s] of cooperating witness testimony").

[73] *E.g.*, A: 121-22, 129, 189.

the SAMs cut off all direct and indirect contact with third parties and the outside world – including prospective defense witnesses and media members – except, as relevant here, members of Guzman's defense team and some immediate relatives.[74] They radically restricted access to newspapers, books and clergymen, flatly prohibiting communal prayer.[75] And beyond "separat[ing]" Guzman from other prisoners and denying him a cellmate, the SAMs barred him from even *talking* – "making [audible] statements," "sending notes" or otherwise "communicating" – to or with fellow inmates incidentally encountered.[76] That is exquisite mental torture. It's cruel, inhumane and enough to drive anyone mad – hindering meaningful counsel consultation and defense participation – over a long period of time.

- To compound the exorbitant SAMs, the district court loaded on a stifling protective order – after yet another batch of secret submissions – that made the case even harder to investigate and defend. Though the bulk of prospective fact witnesses were foreign, the order blocked defense counsel from in any way sharing or reviewing "Protected Discovery" – again as designated by the prosecution – with "persons located outside the United States."[77] And almost as burdensome, the order gave the government and court functional veto power over any potential fact witnesses located stateside. It thus conditioned counsel's reviewing "Protected Discovery" with such individuals on (1) their identification to and vetting by government lawyers; (2)

[74] *See generally*, *e.g.*, A: 86.

[75] *E.g.*, A: 100-01.

[76] *E.g.*, A: 100.

[77] *E.g.*, A: 115 ¶ 6.

> judicial "approval" with an "opportunity" for government lawyers to oppose; and (3) formal judicial warnings, upon personal court appearance, as to the order's "provisions" and the consequences of "any violation."[78] Of necessity, those daunting obstacles would tend to dissuade any domestic fact witness inclined to assist Guzman's defense or testify on his behalf – and deter counsel from even seeking them out, further chilling defense preparation.

The upshot of this exercise in overkill, dwarfing any reasonable need to minimize risks of death or serious physical harm?[79] Leveraging each limitation imposed to bootstrap a chain of others created a snowball effect. It touched off a cascade of escalating restrictions that crippled Guzman's ability to defend and led inexorably to an unfair trial – a war he had to fight with one hand tied behind his back. By grossly exaggerating their response to any safety threat imputed to Guzman, the government and court thus engineered a result that commands no confidence and cannot be allowed to stand.

---

[78] *E.g.*, A: 114 ¶ 5.

[79] *See* 28 C.F.R. § 501.3(a).

B. GUIDING LEGAL PRINCIPLES

A trio of settled legal predicates inform analysis of the pretrial impediments Guzman faced and betray their impermissible extravagance.

First, the Fifth and Sixth amendments' Due Process and Counsel clauses guarantee the accused "a meaningful opportunity to present,"[80] with the "Assistance of Counsel,"[81] a "complete defense"[82] to the charges against him. And adjunct to those fundamental rights – giving them content and effect – the accused is equally entitled to "consult with counsel" and "assist in preparing his defense."[83]

The takeaway? "[U]nreasonable interference" with the accused's "ability to consult counsel" – especially during the critical pretrial preparation phase – is "itself an impairment of the right."[84] It follows that courts "cannot countenance" pretrial confinement conditions – even if

---

[80] *Holmes v. S.C.*, 547 U.S. 319, 324 (2006) (citations and internal quotation marks omitted).

[81] U.S. Const. amend. VI.

[82] *Ante* n.80.

[83] *Drope v. Mo.*, 420 U.S. 162, 171 (1975).

[84] *Benjamin v. Fraser*, 264 F.3d 175, 185 (CA2 2001) (citation and internal quotation marks omitted).

"generally" warranted – that "in practical effect significantly" inhibit counsel's "ability to prepare a defense" with meaningful input from the client.[85]

Second, because due process precludes the imposition of penal sanctions "prior to an adjudication of guilt," jailers may not "punish detainees" unless and until they've been tried and convicted in court.[86] "[P]unitive"[87] pretrial confinement conditions – "pre-conviction punishment"[88] – therefore violate the Fifth Amendment and are strictly forbidden. In short, "pretrial detainees (unlike convicted prisoners) cannot be punished at all."[89] A contrary approach – "[p]unishing a detainee simply for the alleged criminal conduct that led to his detention"[90] – would wrongly put the "retributory cart before the

---

[85] *Basciano v. Lindsay*, 530 F. Supp. 2d 435, 450 (EDNY 2008) ("*Basciano II*"), *reconsideration denied*, No. 07-CV-421, 2008 WL 1700442 (EDNY Apr. 9, 2008), *aff'd sub nom. Basciano v. Martinez*, 316 F. App'x 50 (CA2 Mar. 20, 2009) ("*Basciano IV*").

[86] *J.H. v. Williamson Co., Tenn.*, 951 F.3d 709, 717 (CA6 2020) (quoting *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)).

[87] *El-Hage*, 213 F.3d at 79.

[88] *Brooks v. Terrell*, No. 10-cv-4009, 2010 WL 9462575, at *2 (E.D.N.Y. Oct. 14, 2010).

[89] *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2475 (2015).

[90] *J.H.*, 951 F.3d at 725 (Readler, J., concurring in part and in judgment).

adjudicatory horse,"[91] raising "serious and urgent constitutional questions."[92]

Likewise raising "serious" due process "questions" are "genuine privations and hardship" inflicted on a detainee "over an extended period."[93] So, to avoid a finding of illicit punishment, jailers must "infringe[]"[94] a detainee's rights to "the least possible degree"[95] and prefer "less restrictive options"[96] consistent with the "asserted goal of restr[aining] him."[97] Conversely, conditions that are cumulatively[98] "excessive" or "exaggerated" relative to their assigned "purpose" will be deemed improperly punitive in character.[99] That's particularly true if a

---

[91] *Ibid*.

[92] *U.S. v. Basciano*, 369 F. Supp. 2d 344, 349 (E.D.N.Y. 2005) ("*Basciano I*").

[93] *Wolfish*, 441 U.S. at 542.

[94] *U.S. v. Felipe*, 148 F.3d 101, 111 (CA2 1998).

[95] *Ibid*.

[96] *Basciano III*, 542 F.3d at 953 n.2 (citation and internal quotation marks omitted).

[97] *Felipe*, 148 F.3d at 111 (citation omitted).

[98] *Wolfish*, 441 U.S. at 569 (Marshall, J., dissenting) ("When assessing the restrictions on detainees, we must consider the cumulative impact of restraints imposed during confinement.").

[99] *Ibid*. at 538, 540 & n.23, 548, 551, 555, 561-62 (maj. op.); *see Turner v. Safley*, 482 U.S. 78, 86, 91, 97-98 (1987).

given "sanction" or "disability" has "historically been regarded as a punishment."[100]

More precisely, a regulation is considered "exaggerated" and "excessive" unless based on some "act or omission" committed *during the present pretrial "custody*" that suggests the detainee poses a "serious threat" to safety – his own or others' – or institutional security.[101] And excessiveness in turn triggers an inference of punitive intent on the part of jail administrators. As the Supreme Court explained long ago:

> [L]oading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was punishment.[102]

---

[100] *Wolfish*, 441 U.S. at 537; *see also id.* at 588 (Stevens and Brennan, JJ., dissenting) (similar).

[101] *U.S. v. Gotti*, 755 F. Supp. 1159, 1165 (E.D.N.Y. 1991) (Glasser, J.) (quoting *Wolfish*, 441 U.S. at 538); *accord Boudin v. Thomas*, 533 F. Supp. 786, 790-91 (S.D.N.Y. 1982) (Duffy, J.) (similar).

[102] *Wolfish*, 441 U.S. at 539 n.20; *accord id.* at 567 n.4 (Marshall, J., dissenting) (agreeing that the scenario described in *Wolfish*'s footnote 20 – "'loading a detainee with chains and shackles and throwing him in a dungeon'" – would "create an inference of [impermissibly] punitive intent"); *id.* at 587-88 (Stevens and Brennan, JJ., dissenting) (reading footnote 20 to hold that "the availability of less harsh

In sum, since due process mandates that pretrial detainees are "not to be punished,"[103] jailers don't get the benefit of "unbridled discretion" just because their charge is "notorious[,] newsworthy or both."[104] Nor, for the same reason, do their proffered justifications for imposing extreme and atypical restrictions deserve "automatic[]"[105] or "blind deference."[106] Instead, courts must closely examine such novel restraints to fulfill their constitutional "duty" of protecting detainees from "excessively harsh" pretrial "confinement."[107]

Third, solitary confinement or "near-total isolation"[108] – usually involving 23-hour-a-day lockdown in a small, dark, hot, cold or overly

---

alternatives would give rise to an inference that the practice was motivated by an intent to punish").

[103] *Boudin*, 533 F. Supp. at 791.

[104] *Gotti*, 755 F. Supp. at 1164 (quoting *Boudin*, 533 F. Supp. at 791).

[105] *Boudin*, 533 F. Supp. at 788.

[106] *Gotti*, 755 F. Supp. at 1164.

[107] *U.S. v. Bout*, 860 F. Supp. 2d 303, 311 (S.D.N.Y. 2012) (footnote omitted).

[108] *Davis v. Ayala*, 576 U.S. 257, 289 (2015) (Kennedy, J., concurring); *accord Apodaca v. Raemisch*, 139 S. Ct. 5, 10 (2018) (Sotomayor, J.) (statement respecting cert. denial); *Smith v. Ryan*, 137 S. Ct. 1283, 1283 (2017) (Breyer, J.) (statement respecting cert. denial).

bright segregation cell;[109] "extremely minimal" or "sharply curtailed" mobility, exercise, fresh air and human contact or communication, both internally and with the outside world;[110] and meals pushed through a thin slot in the veritable "penal tomb['s]" heavy door[111] – is a "unique"[112] and "severe constraint"[113] on "liberty"[114] that history *does* consider a "severe"[115] and "dreadful punishment."[116] In the pretrial context, solitary confinement is thus "generally intended as short term housing," used to discipline detainees for jail rule infractions.[117]

---

[109] *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1852-53 (2017); *Apodaca*, 139 S. Ct. at 6; *Davis*, 576 U.S. at 286-87 (Kennedy, J., concurring); *Bout*, 860 F. Supp. 2d at 306; *Brooks*, 2010 WL 9462575, at *1; *Basciano I*, 369 F. Supp. at 347; *Gotti*, 755 F. Supp. at 1160; *Boudin*, 533 F. Supp. at 788-89.

[110] *Bout*, 860 F. Supp. 2d at 305-06, 308; *Basciano I*, 369 F. Supp. at 347; *Gotti*, 755 F. Supp. at 1160; *Boudin*, 533 F. Supp. at 788-89, 791; *Ziglar*, 137 S. Ct. at 1852-53; *Davis*, 576 U.S. at 286-87 (Kennedy, J., concurring); *Apodaca*, 139 S. Ct. at 6.

[111] *Apodaca*, 139 S. Ct. at 6, 10; *Basciano I*, 369 F. Supp. at 347; *Boudin*, 533 F. Supp. at 788.

[112] *Boudin*, 533 F. Supp. at 787.

[113] *Bout*, 860 F. Supp. 2d at 310.

[114] *Ibid*.

[115] *Smith*, 137 S. Ct. at 1283 (quoting *In re Medley*, 134 U.S. 160, 170 (1890)).

[116] *Apodaca*, 139 S. Ct. at 10 (citation and internal quotation marks omitted); *Ibid.; Davis*, 576 U.S. at 287-88 (Kennedy, J., concurring).

[117] *Bout*, 860 F. Supp. 2d at 308 & n.23 (citation and internal quotation marks omitted); *Brooks*, 2010 WL 9462575, at *11; *Boudin*, 533 F. Supp. at 791.

After 2013,[118] however, a "growing consensus"[119] – including at least two current Supreme Court justices and a recently retired one[120] – has come to recognize that "perpetual,"[121] "permanent,"[122] "indefinite"[123] or "indeterminate"[124] solitary confinement presents "deeply troubling concern[s],"[125] raising "serious constitutional questions"[126] and posing "clear constitutional problems."[127] As the consensus reflects, prolonged

---

[118] *J.H.*, 951 F.3d at 720.

[119] *Ibid.* at 719 (quoting *Palakovic v. Wetzel*, 854 F.3d 209, 225 (CA3 2017)).

[120] *See Apodaca*, 139 S. Ct. 5; *Smith*, 137 S. Ct. 1283; *Ruiz v. Tx.*, 137 S. Ct. 1246 (2017) (Breyer, J., dissenting from stay denial); *Davis*, 576 U.S. at 286-90 (Kennedy, J., concurring).

[121] *Basciano I*, 369 F. Supp. 2d at 349.

[122] *Ruiz*, 137 S. Ct. at 1246.

[123] *E.g.*, *Basciano III*, 542 F.3d at 953 (citation and internal quotation marks omitted).

[124] *E.g.*, *Boudin*, 533 F. Supp. at 791.

[125] *Apodaca*, 139 S. Ct. at 6.

[126] *Ruiz*, 137 S. Ct. at 1247.

[127] *Ante* n.125 at 10. Though the Justices' recent "writings" impugning "long-term solitary confinement" came "in cases involving capital prisoners," the constitutional concerns they raise are "broader" and "sweep[] much more" widely. *Apodaca*, 139 S. Ct. at 8; *see*, *E.g.*, *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (unconvicted person's due process rights are "at least as great as the Eighth Amendment protections available to a convicted prisoner"); *Richko v. Wayne Co.*, 819 F.3d 907, 915 (CA6 2016) ("pretrial detainees are entitled to the same Eighth Amendment rights as other inmates") (quoting *Thompson v. Co. of Medina*, 29 F.3d 238, 242 (CA6 1994)). If anything, the "absence of a conviction" makes the

isolation takes a great "human toll" and exacts a "terrible psychiatric price."[128] It inflicts "immense" pain, anxiety and "despair" – even anguish, "agony" and torture – leaving a "wide range" of mental "scars" and causing a "clutch[]" of other "ills."[129]

---

constitutional violation "worse" for detainees than prisoners. *Ziglar*, 137 S. Ct. at 1877-78 (Breyer and Ginsburg, JJ., dissenting).

Nor is the violation dispelled by Guzman's "opportunity" for "attorney interviews" (*Apodaca*, 139 S. Ct. at 8 (quoting *Spain v. Procunier*, 600 F.2d 189, 200 (CA9 1979))); his incidental contact, as a non-English speaker, with jail guards largely unable to communicate in his native Spanish (*see Apodaca*, 139 S. Ct. at 9-10 (citations and internal quotation marks omitted); ECF 50 at 7); or the fact that he was "not *totally*" – only *almost* totally – "deprived of the opportunity to communicate with the outside world." *Turner*, 482 U.S. at 110 (Stevens, Brennan, Marshall and Blackmun, JJ., concurring and dissenting) (emphasis supplied).

Nevertheless, the district court summarily bypassed the substantial constitutional concerns presented – both facial and especially in application – declining to conduct what it dubbed "a referendum on the use of solitary confinement." ECF 71 at 6. In fact, that question-begging dodge was an abdication of the judicial "duty to protect constitutional rights" – to "ensure that [Guzman's pretrial] confinement [wa]s not arbitrarily and unnecessarily harsh" – and it deserves no deference. *Bout*, 860 F. Supp. 2d at 308, 311 (footnotes, citations and internal quotation marks omitted).

[128] *Ruiz*, 137 S. Ct. at 1247 (citation and internal quotation marks omitted); *accord*, *E.g.*, *Smith*, 137 S. Ct. at 1283; *Davis*, 576 U.S. at 287-90 (Kennedy, J., concurring).

[129] *Apodaca*, 139 S. Ct. at 6, 9-10 (citations, footnotes and internal quotation marks omitted).

Typifying the "adverse"[130] if not "devastating effects"[131] that "extended"[132] solitary visits on detainee psyche? Lowlights include disorientation, insomnia, memory loss and hallucination, morphing into paranoia, hopelessness, depression and withdrawal – and culminating in cognitive dysfunction, emotional breakdown and suicidal impulses.[133]

Notably, studies show that this cluster of symptoms – leading to violent insanity, the edge of madness and beyond – begins to appear with even short solitary stints of just days.[134] Yet their ravages can last years, if not forever.[135]

---

[130] *Bout*, 860 F. Supp. 2d at 306.

[131] *E.g.*, *Basciano III*, 542 F.3d at 953 n.2 (citations and internal quotation marks omitted).

[132] *Ruiz*, 137 S. Ct at 1247; *Davis*, 576 U.S. at 286-88 (Kennedy, J., concurring).

[133] *See, E.g.*, *Ruiz*, 137 S. Ct. at 1247; *Davis*, 576 U.S. at 287-88 (Kennedy, J., concurring) (citation omitted); *J.H.*, 951 F.3d at 719; *Palakovic*, 854 F.3d at 225; *Basciano I*, 369 F. Supp. 2d at 352-53 (citation omitted).

[134] *Apodaca*, 139 S. Ct. at 6 n.1; *Ruiz*, 137 S. Ct. at 1247; *Davis*, 576 U.S. at 287-88 (Kennedy, J., concurring); *J.H.*, 951 F.3d at 719; *Williams v. Sec'y Pa. Dep't of Corrs.*, 848 F.3d 549, 566-67 (CA3 2017); *Basciano I*, 369 F. Supp. 2d at 352-53.

[135] *Apodaca*, 139 S. Ct. at 6 n.1; *Ruiz*, 137 S. Ct. at 1247; *Davis*, 576 U.S. at 287-88 (Kennedy, J., concurring).

And the "likely"[136] repercussions of "continued solitary confinement"[137] – the "damage"[138] that flows from snuffing out "meaningful human interaction and relationships"[139] – naturally create peculiar "practical and psychological obstacles"[140] for pretrial detainees. Most prominently, their compromised mental state makes "productive" counsel meetings "much more difficult," hobbling – consequently and otherwise – the ability to "marshal [a] legal defense."[141]

For all those reasons – and because it's "an exceptionally harsh method of preventing a detainee from communicating with his alleged criminal associates" – indefinite isolation ranks as a proverbial "nuclear option."[142] As such, it's properly "reserved for the most extreme cases,"[143]

---

[136] *Basciano I*, 369 F. Supp. 2d at 353.

[137] *Ibid.*

[138] *Boudin*, 533 F. Supp. at 791.

[139] *Ibid.*

[140] *Basciano I*, 369 F. Supp. 2d at 352.

[141] *Ibid.* at 352-53.

[142] *Ibid.* at 351, 353 (internal quotation marks omitted); *accord Basciano III*, 542 F.3d at 953 n.2; *Bout*, 860 F. Supp. 2d at 311 n.40; *Basciano II*, 530 F. Supp. 2d at 439; *cf. Brooks*, 2010 WL 9462575, at *12 (exceptionally harsh way to prevent detainee from promoting prison contraband).

[143] *Basciano I*, 369 F. Supp. 2d at 351.

where it's "clear that less restrictive [alternatives] have failed to constrain"[144] the detainee from conducting criminal activity *during his present confinement* – and "inappropriate"[145] otherwise.

It follows from these premises that the drastic measure of extended pretrial solitary cannot rest on "conclusory statement[s]," "broad generalization[s]," "pure speculation" or even pervasive case "publicity."[146] After all, *any* professed "security concern" – real or imagined, however tenuous or remote – is "logically furthered by," and thus could theoretically justify, "a total ban on inmate communication, not only with other inmates but with outsiders who conceivably might be interested in arranging an attack within the prison or an escape from it."[147]

Rather, to rationalize the extraordinary burdens lengthy segregation places on a detainee's First, Fifth and Sixth Amendment rights – to communication, association, counsel, a defense and a fair trial

---

[144] *Ibid*. at 353; *Basciano III*, 542 F.3d at 953 n.2; *Basciano II*, 530 F. Supp. 2d at 439.

[145] *Basciano III*, 542 F.3d at 953 n.2; *Basciano II*, 530 F. Supp. 2d at 439.

[146] *Bout*, 860 F. Supp. 2d at 309-10.

[147] *Turner*, 482 U.S. at 101 (Stevens, Brennan, Marshall and Blackmun, JJ., concurring and dissenting).

– the government must identify and establish an "especially strong basis" and a "particularly compelling interest."[148]

Crucially, that heightened standard is not satisfied by mere reference to the pending charges' nature, the detainee's alleged criminal affiliations or any conduct ascribed to him prior to entering custody to face the charges.[149] In the long-term pretrial solitary setting, rather, a particularly compelling interest means a "sufficient showing that [the defendant] was engaged in planning acts of violence [or other serious crimes] *while [currently] in pre-trial detention*. Without that nexus to the institutional needs of the BOP or to the purposes of the Bail Reform Act, there is little or nothing that distinguishes [the defendant] from the hundreds of individuals who are accused of having committed violent acts

[148] *Apodaca*, 139 S. Ct. at 8; *see Wolfish*, 441 U.S. at 533 (substantive due process "provides no basis for application of a compelling-necessity standard to conditions of pretrial confinement that are *not alleged to infringe any other, more specific guarantee of the Constitution*") (emphasis supplied); *Brooks*, 2010 WL 9462575, at *10.

[149] *See Bout*, 860 F. Supp. 2d at 309 & n.27; *Basciano I*, 369 F. Supp. 2d at 351-52; *Gotti*, 755 F. Supp. at 1164-65; *Boudin*, 533 F. Supp. at 790-91.

before they were detained."[150] Were it otherwise, "*every* defendant"[151] indicted for "murder, witness intimidation"[152] or similar crimes would be consigned to automatic solitary, converting a last resort to a first response.

***

As we now demonstrate, Guzman's two-and-a-half-year isolation under brutally repressive conditions defied all three of these central axioms: the sacrosanct Fifth and Sixth Amendment rights to counsel and a defense; the ancient prohibition on pre-conviction punishment; and the broad disfavor of open-ended solitary confinement, especially for

---

[150] *Basciano I*, 369 F. Supp. 2d at 351 (first emphasis supplied); *see Bout*, 860 F. Supp. 2d at 308-09 (no evidence of post-arrest "ability to acquire vast resources" – money or weapons; no "basis for concluding that Bout presents a greater danger in general population than that posed by many other inmates at the MCC"); *Brooks*, 2010 WL 9462575, at *11-*12 (absent evidence that Brooks "engaged" in criminal conduct "*while at the MDC*," any "security risk" he posed "did not appear to be substantially greater than the risk posed by many other inmates housed" there, making "indefinite" solitary "[un]warr*ante*d") (emphasis supplied); *Gotti*, 755 F. Supp. at 1165 (no "act" or omission "*since the defendants have been in [federal pretrial] custody*" suggesting serious security threat) (emphasis supplied); *Boudin*, 533 F. Supp. at 790-91 (similar, so any "security risk posed by [detainee] does not appear substantially greater than the risk posed by many other inmates housed at the MCC"); *cf. Davis*, 576 U.S. at 287 (Kennedy, J., concurring) (lamenting number of American inmates serving most or all of their sentences in solitary, "many regardless of their conduct in prison").

[151] *Bout*, 860 F. Supp. 2d at 309 & n.27 (quoting *Gotti*, 755 F. Supp. at 1165) (emphasis *Bout*'s).

[152] *Gotti*, 755 F. Supp. at 1165.

presumptively innocent arrestees, as a constitutionally suspect practice. Alongside the crush of other restrictions needlessly stacked atop the incapacitating segregation – the SAMs; the protective order; the delayed disclosure; the withholding of supposed security information; and the flurry of secret submissions used to induce those hardships – the terms of Guzman's 30-month custody were more than just unprecedentedly excessive. They were arguably barbaric and shock the conscience. Transcending the Constitution and offending basic notions of square play, they precluded a fair trial, demanding reversal and a new one.

C. EXCESSIVE AND PUNITIVE PRETRIAL RESTRAINTS GELDED GUZMAN'S RIGHTS TO COUNSEL, A DEFENSE AND DUE AND COMPULSORY PROCESS, FORECLOSING A FAIR TRIAL AND VIOLATING THE FIFTH AND SIXTH AMENDMENTS

1. Overview

Relying significantly on a spate of private filings skirting adversarial testing – at least 12 by Aug. 2018[153] – the government convinced Judge Cogan to commit Guzman to what the court called long-term "solitary confinement," dramatically "restricti[ng]" internal and

[153] ECF 284 at 2 (8/13/18).

external "communication" and "visit[ation]," before he'd been tried or convicted of anything.[154]

Physically separated from, and condemned to total silence around, fellow inmates, Guzman's custodial conditions prohibited substantially all contact – personal, written, telephone and electronic – with his wife, slashing monitored calls, visits and (delayed) correspondence with other close relatives.[155] More broadly, the conditions extinguished all direct and indirect communication with potential witnesses, media members and other third parties beyond Guzman's defense team, limiting and delaying access to prescreened books, censored magazines and censored newspapers.[156]

As couched by defense counsel with court approval,[157] the conditions left Guzman "confined" to a

> small, windowless cell. He remains in this cell alone for 23 hours a day Mondays through Fridays, when he is permitted a single hour of solitary exercise in another cell that contains one treadmill

---

[154] A: 123.

[155] *See* A: 95-100.

[156] A: 91-96, 100-03.

[157] ECF 50 at 7; A: 124.

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

But those enormous handicaps – criticized by three Supreme Court justices and denounced as illicit pre-conviction punishment by a growing chorus of their lower court colleagues – were only the start. By their express terms, the SAMs and ensuing solitary confinement were designed to "restrict Guzman's access to the mail, the media, the telephone, and visitors"; "prohibit[]" the defense team from "forward[ing] third-party messages to or from" Guzman; and "interrupt" his "communication" with the "outside world" – all for the avowed "purpose"

of "significantly limiting" his "ability to communicate (send or receive) threatening information."[158]

Yet even those draconian measures – blacking out nearly all channels of internal and external communication – failed to satisfy the government. Leaning heavily on another inscrutable private filing, it insisted on a belt-and-suspenders approach, augmenting the SAMs with a wildly overbroad protective order. Not content merely to ban protected discovery review with the case's predominantly foreign witnesses, the order also gave government lawyers and the court – through strict identification, vetting and judicial admonition protocols – an effective veto over their domestic counterparts.[159]

And there was more. Pointing to the SAMs and protective order, and rehearsing the same purported security concerns that ostensibly motivated them, the government used the restrictions already in place – plus still further rounds of secret submissions – to incite a series of pyramiding constraints targeting discrete trial and trial preparation rights of Guzman's. Leading the way? Orders taxing him with an

[158] A: 86-87, 89-96, 103.

[159] *See ante* 27-28 and sources cited.

anonymous and partially sequestered jury; delaying discovery as to key cooperating witnesses and limiting their cross-examination; and withholding other discovery altogether, "summary substitutions" aside, for supposed reasons of national security.[160]

How did the government justify this tower of expanding restraints – one stoking the next, each built atop the last – on Guzman's ability to mount a defense and receive a fair trial? With the perpetual refrain that Guzman, as head of the globe's largest drug cartel, had (1) corrupted *Mexican* authorities to promote enterprise affairs, foil investigations and facilitate prison escapes and (2) arranged to violently eliminate prospective witnesses and others suspected of operating against the cartel's interests.[161]

But those tropes prove too much, refuting themselves and ignoring the proverbial elephant in the room. As Chief Magistrate Judge Mann cogently observed, the *American* justice system and detention center housing the then 60-year-old, 5'4" Guzman – Lower Manhattan's forbidding MCC, "the most secure … Bureau of Prisons … facility in the

[160] *See ante* 25-26 and sources cited.

[161] *E.g.*, ECF 28 at 4 (2/2/17); *id.* 48 at 7 (3/6/17); *id.* 52 at 2; A: 86-89.

New York City Metropolitan Area"[162] – was a world away, physically and substantively, from the shady Mexican officials and jails he assertedly bribed, corrupted and contrived his way out of some years earlier.[163] Thus, absent any claim that Guzman would "collude" with domestic authorities, his government-screened "American lawyers or … their staffs"[164] – and given Judge Cogan's own concession that he behaved in "exemplary" fashion and "displayed considerable grace under pressure" despite "difficult [U.S.] proceedings" and stringent detention terms[165] – it simply was "not reasonable to infer that [Guzman] pose[d] the same level of security and escape risks as when he was held in Mexican prisons."[166]

To put the obvious colloquially, then, *the United States ain't Mexico.* Ironically, the government's own attempts to defend the protective order – "rooted" in Guzman's "demonstrated history of relying on *foreign* professionals, including *foreign* attorneys, to further his crimes" and "his

---

[162] *Basciano III*, 542 F.3d at 953 n.1 (citation and internal quotation marks omitted).

[163] ECF 17 at 11; *id.* 50 at 17; *id.* 52 at 8; A: 173-74 n.17; A: 88; T. 5515, 5532, 5541, 5990.

[164] A: 173-74 n.17.

[165] A: 453.

[166] A: 173-74 n.17.

proven [sic] ability to corrupt *foreign* officials at all levels of government"[167] – only underscore the point.

Still more fundamentally, "[n]umerous high-profile cases have been tried" without incident at Cadman Plaza and Foley Square, as even the government had to confess.[168] And to quote the late Judge Duffy – scarcely a shrinking violet – the MDC and "MCC ha[ve] housed other" pretrial detainees "charged with violent crimes and allegedly linked with [ruthless] organizations without resorting to the oppressive conditions" and defense restrictions thrust on Guzman.[169]

Consider, for example, bloodthirsty mafia dons like John Gotti[170] and Vincent Basciano,[171] famed for graphic retaliation against enemies and snitches real and imagined. Or Brinks robber, convicted cop killer and Weather Underground member Kathy Boudin,[172] a radical domestic terrorist. Or Nicky "Leroy" Barnes, the fabled Harlem crime boss and

---

[167] ECF 48 at 3 (emphasis supplied).

[168] *Ibid.* 8.

[169] *Boudin*, 533 F. Supp. at 791.

[170] 755 F. Supp. 1159.

[171] 369 F. Supp. 2d 344.

[172] 533 F. Supp. 786.

"large scale" international heroin trafficker immortalized in the biopic *American Gangster*.[173] Or international arms dealer Viktor Bout, convicted of conspiring to kill Americans, deliver anti-aircraft missiles and aid the vicious Colombian FARC, a "designated foreign terrorist organization" – all earning him the cheerful nickname "Merchant of Death."[174] Or David Brooks, architect of one of the most brazen and audacious fraud schemes ever prosecuted in our Circuit.[175]

Yet despite their notoriety and the horrific crimes they were accused of committing – many also involving ghastly violence and/or massive narcotics trafficking – none of these malefactors suffered anything approaching the combination of punishing pretrial detention conditions and devastating defense restrictions forced on Guzman. To the contrary, each of them except Barnes – who avoided sustained

---

[173] *See Boudin*, 533 F. Supp. at 791; Nicky Barnes, *Wikipedia*, https://en.wikipedia.org/wiki/Nicky_Barnes (as visited 6/24/20).

[174] 860 F. Supp. 2d at 305; Viktor Bout, *Wikipedia*, https://en.wikipedia.org/wiki/Viktor_Bout; https://www.amazon.com/Merchant-Death-Money-Planes-Possible/dp/047026196X (both as visited 6/24/20).

[175] 2010 WL 9462575; Reed Abelson, David H. Brooks, 61, Dies Serving Time for Insider Trading, N.Y. TIMES, Nov. 1, 2016, https://www.nytimes.com/2016/11/02/business/david-h-brooks-dead.html (as visited 6/24/20).

segregation entirely[176] – won *release* from pre-conviction solitary confinement deemed impermissibly disproportionate.

It follows that the unprecedented set of pretrial restraints Guzman faced stemmed chiefly from his cartoonish persona as the consummate drug lord – a Houdini-like master villain with criminal superpowers. Gangster No. 1. The World's Most Wanted. The Baddest and Most Dangerous Man on the Planet. In short, the stuff of myth and legend. If that reputation-based rationale isn't a classic "exaggerated … response" to a perceived "security problem," then what would be?[177] Afflicted with Special Chapo Rules, Guzman was a literal poster child for "excessive" and "punitive" conditions of pretrial incarceration – and accompanying restrictions on the ability to prepare a defense with effective assistance of counsel.[178]

---

[176] *See Boudin*, 533 F. Supp. at 791.

[177] *Wolfish*, 441 U.S. at 551.

[178] *Ibid.* at 537-39 (citations and internal quotation marks omitted).

2. Indefinite Isolation – Alone and Together with the Other Pretrial Impediments Confronting Him – Was a Cruel, Inhumane and Unconstitutional Overreaction to Any Security Threat Guzman Posed

At the heart of the pre-conviction gauntlet Guzman had to run were the two and a half years he spent locked away in a tiny, windowless box – mute, freezing and forlorn – on the toughest floor of the nation's roughest federal jail. Those depredations – amounting to a virtual sensory deprivation chamber, the modern equivalent of the dungeon, shackles and chains *Wolfish* rebuked – far eclipsed any slate of constraints this Court has approved for a presumptively innocent pretrial detainee, breaking fraught new legal ground. Materially imposed in irrebuttable *ex parte* fashion, their mental and emotional ravages impermissibly encroached on Guzman's Fifth and Sixth Amendment rights to constructively communicate with counsel and meaningfully participate in preparing his own defense, denying him substantive and procedural due process.

a. Thirty Months' Solitary Confinement Went over the Top and beyond the Pale for a Presumptively Innocent Arrestee, Crimping Guzman's Core Fifth and Sixth Amendment Rights – to Intelligent Counsel Consultation and Personal Involvement in Defense Preparation – and Infringing Substantive Due Process

As indicated, the list of local federal detainees held unworthy of perennial segregation – including John Gotti, Vinny Basciano, Viktor Bout, Kathy Boudin and David Brooks – reads like a *Who's Who* of late 20th and early 21st century megacriminals. Of those marquee names, Basciano's case stands out as particularly instructive.

Basciano and Guzman were each claimed to run murderous criminal organizations with global reach: the Bonnano mob[179] and Sinaloa Cartel, respectively. And like Guzman, Basciano was also accused of deadly violence: killing a mafia rival in an internal power

[179] *E.g.*, *Basciano I*, 369 F. Supp. 2d at 346; James B. Jacobs & Lauryn P. Gouldin, Cosa Nostra: *The Final Chapter?* 25 CRIME & JUST. 129, 170 (1999) (discussing successful Manhattan federal prosecution of "an international heroin-trafficking operation, including a Sicilian mafia faction and New York City's Bonanno crime family[,] and involving over two hundred participants … [and] two dozen defendants').

struggle and suggested involvement in a plot to assassinate a federal prosecutor.[180]

Echoing the fears professed below, the government worried that Basciano "will continue to direct the affairs of the Bonnano family, including ordering acts of extreme violence," unless "prevented from passing messages to" – or otherwise "communicating with" – other "Bonnano … members and associates" while awaiting trial.[181] And as the government saw it, the "only way to accomplish th[o]s[e] end[s]" – to cut off "potential conduits through which [Basciano] might send and receive messages, and thereby direct [Bonnano] activities" – was to "place" him "indefinitely in administrative detention" under "the most restrictive … conditions available within the metropolitan New York area."[182]

Accordingly, and as in this case, the government threw Basciano into indeterminate solitary confinement, projected to last at least 18 months, in the MCC's Special Housing Unit, known as 10 South.[183] As

---

[180] *Basciano I*, 369 F. Supp. 2d at 347; Randolph Pizzolo, Mafia Wiki, https://mafia.wikia.org/wiki/Randolph_Pizzolo (as visited 6/26/20).

[181] *Basciano I*, 369 F. Supp. 2d at 346-47.

[182] *Ibid.* at 346, 350.

[183] *Ibid.* at 347-48.

canvassed by the district court, the privations Basciano experienced there – most notably, "severe restrictions on [his] ability to interact with other people, both inside and outside the [jail]"[184] – closely paralleled, yet still stopped well short, of those Guzman endured:

> Unit 10 South is considered to be the most secure housing available at any Bureau of Prisons … facility in the New York City metropolitan area, and is generally reserved for terrorism suspects, detainees who have shown themselves to be a danger to other inmates and/or prison guards, and cooperating witnesses. Detainees in 10 South are confined to cells with blacked out windows 23 hours per day during the week, and round-the-clock on weekends. Despite representations from the government that the lights in the SHU can be turned off, Basciano asserts that the lights are left on 24 hours a day. Access to radios, and reading materials, including legal papers, appears in practice to be quite limited. Meals are received on trays that are pushed through a narrow slot in the cell door. Finally, and perhaps most significantly, Basciano's contacts with other human beings have been sharply curtailed. He receives only one social visit per week, is not permitted to speak to anyone while in his cell, and his telephone privileges are described by his counsel as "nonexistent." These are the conditions under which Basciano has lived for nearly four months, and under which the

[184] *Ibid.* at 347 (citations omitted).

> government proposes to keep him until his trial on this indictment.[185]

Judge Garaufis didn't buy the government's pre-conviction justifications – mimicking those urged here – for stowing Basciano in "indefinite … solitary confinement" under the "harsh conditions present in the [MCC's] SHU."[186] On the defense's motion, the court ordered him "released into general population," finding the government's "concerns … greatly exaggerated" and its "response … wholly out of line" with any "threat" Basciano "allegedly posed."[187]

The court began by branding "[i]ndefinite detention in the SHU" an "exceptionally harsh method of preventing a detainee from communicating with his alleged criminal associates" – one properly "reserved for the most extreme cases."[188] And "without more," merely "committing the [sensational] crimes … charged under th[e pending] indictment" didn't reach that commanding height.[189]

---

[185] *Ibid.*

[186] *Ibid.* at 351-52.

[187] *Ibid.* at 350, 353.

[188] *Ibid.* at 351.

[189] *Ibid.* at 352.

Why not? Because the government failed to sufficiently show that Basciano was "engaged in planning acts of violence" or similarly serious crimes "*while in pre-trial detention*."[190] Absent that pivotal "nexus to the institutional needs of the BOP or … the purposes of the Bail Reform Act," Judge Garaufis emphasized, "little or nothing … distinguish[ed]" Basciano from the "hundreds of individuals in pre-trial detention who are accused of having committed violent acts *before* they were detained."[191]

To make matters worse, Judge Garaufis added, it's "well documented" that long-term solitary has "devastating effects" on detainee welfare.[192] Invoking an oft-cited scholarly article, he surveyed the parade of horribles solitary spawns:

> Direct studies of the effects of prison isolation have documented a wide range of harmful psychological effects, including increases in negative attitudes and affect, insomnia, anxiety, panic, withdrawal, hypersensitivity, ruminations, cognitive dysfunction, hallucinations, loss of control, aggression, rage, paranoia, hopelessness, lethargy, depression, emotional breakdowns, self-mutilation, and suicidal impulses.... *There is not a*

[190] *Ibid.* at 351-52 (emphasis supplied).

[191] *Ibid.* at 351.

[192] *Ibid.* at 352.

> *single study of solitary confinement wherein non-voluntary confinement that lasted for longer than 10 days failed to result in negative psychological effects.*[193]

Against that backdrop, Judge Garaufis concluded, the "likely effect of continued solitary" on Basciano's "mental state" would "make it much more difficult for him to have productive meetings with … counsel" and "marshal his legal defense."[194] Given those "practical and psychological obstacles," the court rejected the "'nuclear option' of indefinite solitary" until it was "clear" that "less restrictive means" – including limiting "visitors" and "enforcing separation orders" within the jail – had "failed to constrain Basciano."[195]

Equally apt is another Brooklyn federal ruling rebuffing extended pretrial solitary for an even brighter Mob Star[196]: racketeer extraordinaire John J. Gotti. Gotti, the flamboyant Gambino crime family boss and one of the most fabled gangsters in American history,

---

[193] *Ibid.* at 352-53 (emphasis supplied) (citation omitted).

[194] *Ibid.*

[195] *Ibid.* at 346 n.1, 350, 352-53.

[196] *See* https://www.amazon.com/Mob-Star-Story-John-Gotti/dp/0028644166 (as visited 6/27/20).

needs no belabored introduction, except to recall that he killed his way to the top, wantonly gunning down an incumbent predecessor; mercilessly rubbed out perceived enemies, rivals and turncoat witnesses; and successfully rigged a gaggle of U.S. juries, state and federal, earning him the moniker "Teflon Don."[197]

Before the trial resulting in his conviction and life sentence, the government repaired Gotti to MCC segregation akin to Basciano's and Guzman's, though still less arduous than the latter's.[198] To support this invasion of Gotti's ability to aid in "conduct[ing]" his "defense" with "effective assistance of counsel," the government pointed to "the nature of the [pending] charges," including "multiple murders," "obstruction of justice" and "witness tampering."[199]

---

[197] *See*, *E.g.*, Arnold H. Lubasch, Juror is Convicted of Selling Vote to Gotti, N.Y. TIMES, Nov. 7, 1992, https://www.nytimes.com/1992/11/07/nyregion/juror-is-convicted-of-selling-vote-to-gotti.html; Ronald Powers, Authorities: Juror in 1987 John Gotti Trial Indicted in Case Fixing Scheme, AP NEWS, Feb. 24, 1992, https://apnews.com/657d86c9e1042249ccf742053740b234; Howard Koplowitz, Man Charged With Tampering in Gotti's 1992 Trial, QNS, April 30, 2010, https://qns.com/story/2010/04/30/man-charged-with-tampering-in-gottis-1992-trial/; Thomas C. Smith, John Gotti Trial: 1992, JRANK, https://law.jrank.org/pages/3526/John-Gotti-Trial-1992-Tide-Changes-Prosecutors.html (all as visited 6/27/20).

[198] 755 F. Supp. at 1160-61.

[199] *Ibid.* at 1161, 1164-65.

Like Judge Garaufis, Judge Glasser wasn't having it. Refusing to "blind[ly] defer[]" to jailer "discretion" just because the defendant was "notorious" and "newsworthy," he noted that the government's position, taken to its logical end, would mean automatic solitary for "*every*" detainee charged with similarly heinous crimes.[200] With no evidence that Gotti had done anything to threaten others or jeopardize institutional security "*since [he'd] been in custody*," Judge Glasser, thus tracking Judge Garaufis's reasoning, likewise held lengthy pretrial solitary "exaggerated" and "'excessive'" – "punitive and not regulatory."[201] He therefore directed the MCC to release Gotti from "administrative detention."[202]

Together, then, *Basciano* and *Gotti* require proof that the accused planned violent or other serious crimes *while in pretrial detention* to

---

[200] *Ibid.* at 1164-65 (quoting *Boudin*, 533 F. Supp. at 791) (internal quotation marks omitted) (emphasis supplied).

[201] *Ibid.* at 1165 (quoting *Wolfish*, 441 U.S. at 538).

[202] *Ibid.*; *see also*, *E.g.*, *Bout*, 860 F. Supp. 2d at 305-06, 311 & n.38 (defendant's "spotless disciplinary record" made 15-month solitary stint in MCC's SHU "arbitrarily and excessively harsh" and unnecessarily "punitive" – despite purported fears of "escape or harm"); *Boudin*, 533 F. Supp. at 790-91 (prolonged pretrial solitary "exaggerated" and punitive, despite potential "risks of escape and … violence," where defendant neither issued any threats nor jeopardized institutional security since she'd been in custody).

vindicate protracted solitary's devastating mental effects and the concomitant burdens they place on an arrestee's rights to counsel and a defense. Conversely, merely being *charged* with those sorts of crimes or committing them *before* entering federal custody doesn't suffice.

Here, however, the government alleged only that Guzman had previously coopted *Mexican* officials, escaped *Mexican* prisons, obstructed *Mexican* justice, and silenced, killed or otherwise intimidated *Mexican* witnesses and suspected rivals – *all as part of the continuing criminal enterprise charged in indictment Count One*. To quote the prosecution's own protective order proffer, Guzman had an asserted "history of relying on *foreign* professionals, including *foreign* attorneys, to further his crimes" and an ostensible "ability to corrupt *foreign* officials at all levels of government."[203]

By contrast, even Judge Cogan had to admit that Guzman's conduct since arriving in America had been "exemplary," evincing "considerable grace under pressure" despite "difficult proceedings" and stringent detention terms.[204] Accordingly, as Chief Magistrate Judge Mann

[203] ECF 48 at 3 (emphasis supplied).

[204] A: 453.

astutely recognized, it was "[un]reasonable to infer"[205] that Guzman – 60 years old, 5'4" tall and closeted in "the most secure" federal pretrial confinement "facility in the New York City Metropolitan Area,"[206] if not the entire United States – "pose[d] the same level" of corruption, "security and escape risks as when he was held" in dodgy "Mexican" jails.[207]

Two additional factors bolster that conclusion. **First**, even the prosecutors disclaimed any danger that Guzman would "collude" with domestic authorities, his government-screened "American lawyers or … their staffs."[208] **Second**, "less restrictive options"[209] – both already in place and readily available – obviated any risk that Guzman would use intermediaries to threaten or harm prospective witnesses,[210] making permanent pre-conviction solitary excessive, unnecessary and redundant.

---

[205] A: 173-74 n.17.

[206] *Basciano III*, 542 F.3d at 953 n.1 (citation and internal quotation marks omitted).

[207] A: 173-74 n.17.

[208] *Ibid*.

[209] *Basciano I*, 369 F. Supp. 2d at 353.

[210] *See*, *e.g.*, A: 88.

The former included SAMs provisions (i) limiting non-legal contacts to highly infrequent visits,[211] calls and correspondence – all contemporaneously monitored – with a few immediate relatives and (ii) barring Guzman's legal team from relaying messages to or from third parties. It also included protective order provisions forbidding defense counsel from showing sensitive discovery, as designated by the prosecution, to foreign witnesses – or *any* witness over de facto government or court veto.

As for the latter, Judge Garaufis identified the enforcement of "separation orders" within the MCC as a viable "means" to "address the government's concerns" that was "less restrictive" than "indefinite [pretrial] solitary confinement."[212] There was no legitimate reason to bypass that obvious alternative here.

---

[211] *See Basciano I*, 369 F. Supp. 2d at 350 (proposing restricted visitor access as a lesser alternative to perpetual pretrial isolation).

[212] *Ibid.* at 346 n.1, 350, 353. Indeed, the record reflects that even that much – the intermediate step of separation orders – may have been unwarr*ante*d. For when cooperating witness Alex Cifuentes encountered Guzman "by coincidence" in the MCC SHU area, the chance meeting proved entirely uneventful. Far from frightened, in fact, Cifuentes was the one that "spontaneously" called out to Guzman who, obeying the SAMs, apparently said nothing. T. 5193-94. Similarly, prosecution witness Vicente Zambada volunteered that although Guzman knew for years – and while still at large – that Zambada was cooperating with the government and would testify against him, Zambada met no harm. T. 4275-76.

Hence, on the strength of *Basciano* and *Gotti*, it follows that the "'nuclear option'"[213] of 30-month segregation prior to conviction was "exaggerated and excessive," making it "punitive" rather than "regulatory" and therefore erroneously imposed.[214]

None of this Court's cases are to the contrary. For the Court has never approved a collection of pretrial restrictions even approximating those foisted on Guzman. In fact, it has never approved indeterminate solitary confinement for pretrial detainees *at all*.

The al Qaeda terrorism suspect in *El-Hage* was only "subject to solitary" for 15 of his 30-33 months "served or contemplated" in pre-conviction custody, having gotten a "cellmate" before his SAMs challenge was even heard.[215] And besides Guzman's spending twice as long in segregation "without a conviction," El-Hage was "also permitted three calls per month to his family," plus "extra" time for each, "rather than the

[213] *Basciano I*, 369 F. Supp. 2d at 353.

[214] *Gotti*, 755 F. Supp. at 1165 (citation and internal quotation marks omitted).

[215] 213 F.3d at 76, 78.

one call per month usual for inmates [including Guzman] in administrative detention."[216]

As for the Latin Kings prison gang leader in *Felipe*[217] and the jihadist cleric in *U.S. v. Stewart*,[218] both were *sentenced* inmates convicted after trial. The convictions having authorized punishment, this Court had no occasion to consider whether their permanent solitary confinement was *presumptively* punitive *because* excessive and exaggerated – whatever its "intended"[219] purpose. Beyond that, Felipe had "committed the very crimes for which he [wa]s … serving a life" term – ordering at least six murders among them – "[f]rom his [American] jail cell."[220] What's more, Felipe also "retain[ed] the right to communicate with prison employees (including pastoral, medical, and educational department staff)," whereas Guzman's captors were largely unable to speak his native Spanish.[221]

---

[216] *Ibid.* at 78; *compare* A: 95.

[217] 148 F.3d at 106-07, 109.

[218] 590 F.3d 93, 101-02, 111-12 (CA2 2009) (dictum).

[219] *El-Hage*, 213 F.3d at 81-82; *see Felipe*, 148 F.3d at 107.

[220] 148 F.3d at 111-12.

[221] Compare *ibid.* at 110-11 with *ante* n.127.

The same is true of Basciano by the time his SAMs challenge reached this Court. At that point, the Court's scant, unpublished opinion reports, he too had been "convicted of a series of crimes," "sentenced to life in prison" and found to have "engaged in criminal activity from jail," "violat[ing] prison communications restrictions" and endeavoring to "interfere with his own trial."[222]

The bottom line? There is no controlling precedent, absent any wrongdoing while presently detained, for perpetual solitary confinement preceding conviction and lasting two-and-a-half years. Sanctioning that scenario would set a dangerous, uncharted course lacking discernible end point – one proliferating the detriments of punishment without trial – solely because of this defendant's exceptional notoriety. That approach, counter to the views of three Supreme Court justices and at least two sister circuits (Three and Six), would raise grave constitutional questions around the Fifth and Sixth Amendment rights to counsel, defense, fair trial and substantive due process. It should not prevail.

[222] *Basciano IV*, 316 F. App'x at 50-51.

b. Procuring the Solitary Confinement and Additional Restraints by Unchallengeable Secret Submissions Flouted Guzman's Rights to Adequate Notice and Hearing – through Counsel and Otherwise – Also Subverting Procedural Due Process

If substantive due process and associated violations weren't enough, the government confided Guzman to eternal pre-conviction segregation – and obtained the overbroad protective order assailed in **SUBPOINT II(C)(3)** – in material reliance on private court filings evading adversarial scrutiny or opposition. It then used the existing restrictions and the concerns purportedly prompting them – supplemented with scads more secret submissions, also defying dispute – to justify limiting or suspending concrete constitutional and statutory rights[223] integral to preparing and presenting a defense and assuring a fair trial.[224]

[223] *See*, *E.g.*, *U.S. v. Concord Mgmt. & Consulting LLC*, 404 F. Supp. 3d 67, 73 (D.D.C. 2019) (noting that Fed. R. Crim. P. 16 "entitles a defendant to relevant discovery" despite absence of "general constitutional right to discovery in a criminal case") (citation and internal quotation marks omitted).

[224] *See U.S. v. Wecht*, 484 F.3d 194, 229, 236 (CA3 2007) (Bright, J., concurring and dissenting) (even "small citation" to private filing "reinforces" ex parte advocacy's malign "influence[,]" indicating that judge "relied on it when making subsequent decisions" – especially where, as here, "chain" of ensuing "motions and proceedings" flowed partly from "secrecy surrounding" original one-sided submission "exclud[ing] defense counsel from the adversary process").

Among the stiffest constraints? Rulings handcuffing Guzman with an anonymous and partially sequestered jury; deferring disclosure and curbing cross-examination as to linchpin government witnesses; and withholding access – save summary substitutions framed by the very prosecutors aiming to convict Guzman – to otherwise discoverable and potentially helpful evidence the government unilaterally designated classified.[225] Substantive due process aside, constructing this mountain of interlocking impediments by routine resort to secrecy also offended procedural due process,[226] effectively denying Guzman counsel at critical stages of the prosecution.[227]

---

[225] See *ante* 25-28.

[226] *See ante* n.98. Gr*ante*d, district courts have express textual authority – under the Classified Information Procedures Act, 18 U.S.C. app. 3, § 4, and Fed R. Crim. P. 16(d)(1) – to enter ex parte orders restricting discovery for good cause shown, which may include national security considerations. *See Al-Farekh*, 956 F.3d at 106-07 & nn. 7-8. But any orders so issued still must satisfy the demands of due process. *See Abuhamra*, 389 F.3d at 324 & n.10; *accord*, *E.g.*, *U.S. v. Fishenko*, No. 12-cv-626, 2014 WL 5587191, at *2 (E.D.N.Y. Nov. 3, 2014) (though "certain discoverable material" deemed classified under CIPA, court still must preserve defendants' "retain[ed] constitutional rights to participate in their own defense"); *U.S. v. Workman*, No. 18 CR 20, 2019 WL 276843, at *1 (W.D. Va. Jan. 22. 2019) (Rule 16(d) protective order "should not override a defendant's right to a fair trial, which includes the right to assist and participate meaningfully in the defense") (citations omitted). And in the aggregate, the government's rampant use of irrefutable private filings to curtail Guzman's substantial rights ran afoul of procedural due process, making the operative statute and rule unconstitutional as applied.

[227] *See*, *E.g.*, *U.S. v. Paulus*, 952 F.3d 717, 722-23 (CA6 2020).

"If this case illustrates any basic principle of justice, it is that secrecy and the right of the defendant and the public to a fair and open trial do not mix except in rare and unusual circumstances not presented" here.[228] Backchannel court rulings – based on information submitted by one party without the opponent's involvement – are "fundamentally at odds with our traditions of jurisprudence."[229] Accordingly, this Court "generally disfavor[s]"[230] ex parte practice because it "compromise[s] a defendant's due process right to a fair hearing"[231] and undermines "the public's interest in open criminal proceedings."[232] For when a court makes a "secret, one-sided determination of [decisive] facts" in "resolving an issue that is the subject of an adversarial proceeding," fairness can "rarely be obtained" without a chance to "correct or contradict arguments or evidence offered by the other."[233] To that end, a defendant has a

---

[228] *Wecht*, 484 F.3d at 224 (Bright, J., concurring and dissenting).

[229] *U.S. v. Innamorati*, 996 F.2d 456, 487 (CA1 1993).

[230] *U.S. v. Abu-Jihaad*, 630 F.3d 102, 143 (CA2 2010) (citation and internal quotation marks omitted).

[231] *Abuhamra*, 389 F.3d at 314, 321.

[232] *Ibid.*

[233] *Ibid.* at 322-23 (citations, internal quotation marks and footnote omitted).

cardinal "right to know what information is being submitted to the decisionmaker and [an] opportunity to challenge [its] reliability … as well as provide contrary information."[234]

More precisely, "[e]x parte hearings" are "dangerous" and "problematic" because they deprive the court of the "fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate."[235] Ruling on "important issues without hearing from the defense" therefore risks "erroneous decisions that will unfairly disadvantage the defendant."[236] In short, "*ex parte* proceedings" impair the "ability to exercise discretion" as a court can't be "fully informed" when engaging one side alone.[237]

On a broader level, too, "contemporaneous review of criminal prosecutions in the forum of public opinion" acts as an "important" check on "abuse of government power," fostering an "appearance of justice"

---

[234] *Ibid.* at 326 (citations and internal quotation marks omitted).

[235] *Paulus*, 952 F.3d at 724 (citations and internal quotation marks omitted).

[236] *Ibid.*

[237] *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 178 (CA4 2019).

that's best ensured by "allowing people to observe it."[238] Since "determinations" made "in closed proceedings or on secret evidence" thus disserve the accused and public alike, the law contemplates both substance summary and "some opportunity" for "open court" reliability testing – even in "adversarial proceeding[s]" implicating witness "confidential[ity]" concerns.[239]

Given their renowned perils and pitfalls, then, "[*e*]*x parte* submissions" are "generally" inappropriate except in "rare cases" where "(1) the government satisfies the standard for closed criminal proceedings established in *Waller v. Georgia*[240]; (2) the government discloses to defendant the substance of the government's sealed submission; and (3) the district court engages in heightened scrutiny of the reliability of any *ex parte, in camera* submissions."[241] In particular, a narrow

> exception to this rule may be made *only* in cases in which there is a compelling need to maintain the secrecy of certain evidence, no alternative means of meeting that need exist other than *ex*

---

[238] *Abuhamra*, 389 F.3d 323 (citations and internal quotation marks omitted).

[239] *Ibid.* at 324-26 (citations and internal quotation marks omitted).

[240] 467 U.S. 39 (1984).

[241] *Abuhamra*, 389 F.3d at 314, 321.

> *parte* submission, and the court carefully limits its sealing order only to materials genuinely implicating the compelling need.[242] Even in such rare circumstances, due process permits a court to consider *ex parte* evidence … *only* upon substitute disclosure of the substance of the information to the defense and scrupulous review by the court of the reliability of the sealed materials.[243]

The district court held *Abuhamra* inapplicable and refused to follow its protocol, shunning *Waller* findings[244] and taking none of the steps this Court prescribes in opting to entertain a rash of one-sided filings[245] – reputedly a rare event. Noting that *Abuhamra* involved "*ex parte* evidence" submitted during "post-trial detention proceedings," the district court opined that a *convict*'s "liberty interest" in bail release trumps a presumptively innocent *arrestee's* interest in avoiding

---

[242] *See generally Waller,* 467 U.S. at 48.

[243] *Abuhamra*, 389 F.3d at 321 (emphasis supplied).

[244] *See Wecht*, 484 F.3d at 224-25 (Bright, J., concurring and dissenting) (sealing ex parte motion and accompanying documents without making any "particularized" findings "on the record" in support limited ability to prepare defense and improperly shifted burden to justify protective order, forcing defendant to spend months arguing why "motion should be *un*sealed").

[245] Again, the government did provide self-written summary substitutions of the evidence withheld under CIPA – but not of the ex parte motion(s) seeking leave to withhold it.

confinement conditions and restrictions that concededly "burden[]" his defense,[246] rendering the case inapt.[247]

That gloss is too literalistic, underreading *Abuhamra* and inverting the decision's thrust. **First**, *Abuhamra* itself confirms what logic and intuition suggest: an arrestee's "liberty interest"[248] in freedom from "punitive"[249] pretrial detention is greater – not less – than any residual interest a convicted criminal retains in release on bail after a guilty verdict. Judge Cogan thus got it squarely backward, as this Court made crystal clear:

> [O]nce a jury found Abuhamra guilty beyond a reasonable doubt of multiple felonies, his reasonable expectation of continued freedom from government detention was significantly reduced from that of the average law-abiding citizen, *or that of a pre-trial defendant*. *In the pre-trial context, a defendant's liberty interest can implicate substantive as well as procedural rights, specifically, the proscription against punitive detention before trial*. But once a defendant is afforded the considerable process and constitutional protections of a jury trial and found

[246] *See*, *e.g.*, A: 122; 2/16/17 Tr. 27.

[247] A: 141.

[248] 389 F.3d at 318-19.

[249] *Ibid*.

> guilty beyond a reasonable doubt, the substantive interest in avoiding punitive detention *essentially disappears*, and any continued expectation of liberty pending formal sentencing depends largely on statute.
>
> [And t]he statute relevant to Abuhamra's case, the Bail Reform Act of 1984, creates no general expectation of post-verdict liberty. To the contrary, it establishes a *presumption in favor of detention*.[250]

Second, *Abhumara* cited a medley of cases outside the post-conviction bail context[251] – and even drew a telling CIPA analogy[252] – in generally proscribing secret submissions and laying down a protocol for rare exceptions, belying the district court's cramped reading.

Third, this Court itself has since applied *Abuhamra* in settings transcending post-conviction bail and broadly resembling the circumstances here,[253] further confounding the district court's bid to cabin the case's reasoning to its facts.

---

[250] *Ibid.* (emphasis supplied) (citations and footnote omitted).

[251] *Ibid.* at 330 n.18.

[252] *Ibid.* at 331.

[253] *See Cabral v. Strada*, 513 F. App'x 99, 102 (CA2 2013) (pretrial placement in protective custody); *U.S. v. Aref*, 285 F. App'x 784, 793-94 (CA2 2008) (motion to suppress classified evidence).

Accordingly, reversal also follows because the district court denied Guzman the hallmarks of procedural due process – fair notice and hearing opportunity[254] – by regularly retracting essential rights in substantially private fashion,[255] without heeding *Abuhamra*'s rigorous protocol whereby

> (1) the government advances an overriding interest that is likely to be prejudiced by disclosure of the evidence at issue[;] (2) the order sealing the evidence is no broader than necessary to protect that interest[;] (3) the district court considers reasonable alternatives to proceeding ex parte[;] (4) the court makes findings adequate to support an ex parte proceeding[;] (5) the government discloses the substance of its ex parte submission to the defense[;] and (6) the district court engages in heightened scrutiny of the reliability of the ex parte submissions.[256]

Indeed, any justification for continued secrecy evaporated once abiding segregation and a suffocating protective order[257] – themselves

---

[254] *See Abuhamra*, 389 F.3d at 318, 322, 330.

[255] *Cf. U.S. v. Yousef,* 327 F.3d 56, 169 (CA2 2003) ("no connection" between "sealed" information and district court decision "deny[ing] severance or separate juries'); *Tsarnaev*, 968 F.3d at 95 (unimportant material discussed at brief ex parte hearing "inflicted no prejudice") (citation and internal quotation marks omitted).

[256] 389 F.3d at 332.

[257] *See* **SUBPOINT II(C)(3)**.

premised partly on inappropriate private filings – effectively idled Guzman and throttled his outside contact. At a minimum, additional one-sided submissions were thus unnecessary and excessive, fueling a troubling appearance of impropriety.[258]

3. Overbroad Protective Orders – Needlessly Cumulative of the Disabling Solitary Confinement, and Again Resting Significantly on Indisputable Secret Filings – Unfairly Hampered Guzman in Interviewing and Cross-Examining Witnesses, Inflaming the Violations of His Rights to Counsel, a Defense, and Due and Compulsory Process

Having sidelined Guzman as a criminal threat and choked off his outside access[259] by infinite isolation, the government insisted on pushing the envelope. Upping their pattern of material ex parte practice, the prosecutors heaped on smothering protective orders that imposed more sweeping restrictions and unduly overlapped the paralyzing

[258] *See*, *E.g.*, *U.S. v. Carmichael*, 232 F.3d 510, 517 (CA6 2000) ("in all but the most exceptional circumstances, *ex parte* communications with the court are an extraordinarily bad idea"); *Grieco v. Meachum*, 533 F.2d 713, 719 (CA1 1976), *overruled on other grounds*, *Me. v. Moulton*, 474 U.S. 159 (1985).

[259] *See ante* nn.73-76.

sequestration,[260] further derailing Guzman's efforts to defend through effective counsel.

First, in a case alleging predominantly foreign misconduct, the principal protective order flatly prohibited the defense from reviewing sensitive discovery – as determined by the prosecution alone – with any potential witnesses located abroad.[261]

Second, the principal order conditioned domestic witness review on their vetting and approval by a government "firewall" team[262] and the

---

[260] As the government itself allowed, the court entered the initial "protective order" and endorsed "restrictions" on Guzman's "ability to receive visitors and contact third parties" based "in part" on "concerns" professed in a swath of "*ex parte* submissions." ECF 283 at 2 (8/13/18). In effect, the restrictions limited visitation to Guzman's "seven-year old daughters" and calls to "two monthly [15]-minute" chats with his "sister, mother and daughters" – all subject to government monitoring. *Id.* 284 at 1 (8/13/18); *cf. U.S. v. Zangrillo*, 19-cr-10080, 2020 WL 1027815, at *8 (D. Mass. March 3, 2020) ("strict protective order" made heavy document redactions superfluous).

[261] *See ante* n.77.

[262] The firewall team was a band of government lawyers, distinct from the prosecution team, tasked with the vetting and other duties in a bid to preserve the confidentiality of Guzman's defense strategy. At a minimum, this arrangement created an inherent "appearance of unfairness" by leaving "the government's fox" in charge of the defendant's "henhouse." *In re Search Warrant*, 942 F.3d at 182 [quoting *U.S. v. Neill*, 952 F. Supp. 834, 841 n.14 (D.D.C. 1993) and *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (CA6 2006)]. As Judge Brieant bluntly put it:

> [R]eliance on the implementation of a … [w]all, especially in the context of a criminal prosecution, is highly questionable[] and should be discouraged. The appearance of [j]ustice must be served, as well as the interests of [j]ustice. It is a great leap of faith to expect that members

presiding judge, buttressed by in-person judicial warnings as to the order's terms and the consequences of any violation.[263]

Third, a string of supplementary orders postponed vital disclosure as to major cooperating witnesses – in a case with global reach, a 25 year time frame,[264] "over a decade" of investigation[265] and "massive" amounts of discovery[266] – until just two weeks before each took the stand.[267] By the

---

> of the … public would believe any such … wall would be impenetrable; this notwithstanding our own trust in the honor of an AUSA.

In re Search Warrant for Law Offices Executed Mar. 19, 1992, 153 F.R.D. 55, 59 (S.D.N.Y. 1994); *accord*, *E.g.*, *U.S. v. Gallego*, No. CR-18-01537-001-TUC-RM (BPV), 2018 WL 4257967, at *2 (D. Ariz. Sept. 6, 2018) (collecting cases "skeptical" of taint, filter or wall teams) (citation and internal quotation marks omitted); *U.S. v. Kaplan*, No. 02-cr-883, 2003 WL 22880914, at *11-*12 (S.D.N.Y. Dec. 5, 2003) (providing case agent with "potentially privileged" materials "eviscerate[d] any claim that an 'ethical wall team' within the [g]overnment effectively screens [out] the prosecution team"); *U.S. v. Stewart*, No. 02 -cr-396, 2002 WL 1300059 (S.D.N.Y. June 11, 2002) (appointing special master in lieu of government privilege team); *U.S. v. Hunter*, 13 F. Supp. 2d 574, 583 & n.2 (D. Vt. 1998) ("It may have been preferable for the screening of potentially privileged records to be left not to a prosecutor behind a 'Chinese Wall,' but to a special master or the magistrate judge.").

[263] See *ante* n.78.

[264] A: 57-58 ¶ 7.

[265] ECF 44 at 10 n.7 (2/24/17).

[266] *Ibid.*; *see* ECF 282 at 2 (8/13/18) ("329,000 pages of documents and hundreds of thousands of intercepted and recorded conversations" produced by Aug. 2018 alone).

[267] *E.g.*, 8/14/18 Tr. 5-9; A: 183, 196, 205-06; ECF 275 at 5-6 n.1 (7/30/18); *id.* 294 (8/24/18).

government's own account, the welter of embargoed items included buckets of material otherwise owed Guzman under Fed. R. Crim. P. 16 and 18 U.S.C. § 3500 – thousands of pages of documents and dozens of recordings at the head of the pack.[268]

The proffered ground for these drastic incursions? The stock refrain of "safety concerns"[269] – meaning the felt need to "protect cooperating witnesses and their families," Guzman having assertedly used relatives and other "intermediaries" to threaten or kill suspected witnesses and kidnap witness "family members."[270] In other words, *the same putative "concerns" that drove the SAMs*. The same putative "concerns" that unrelenting solitary, isolation from the outside world and preventing

---

[268] *Ibid.*; *see ante* 26.

[269] A: 206; *see also* A: 109-10 ("serious security concerns"). Purportedly to "protect ongoing and future investigations," the principal protective order counted as "'Protected Material'" information "related to sensitive law enforcement techniques." A: 104-05. Guzman does not specifically challenge that designation on appeal. Suffice to say that the law enforcement privilege is qualified, not absolute, so it must yield to a criminal defendant's "need for discovery" in appropriate circumstances. *In re City of NY*, 607 F.3d 923, 940-43, 950 (CA2 2010); *see also Tsarnaev*, 968 F.3d at 74 (requiring "specific" and "concrete" – not "speculative" and "conclusory" – law enforcement privilege "showing"). **SUBPOINT II(C)(4)** addresses similar issues in the CIPA context.

[270] ECF 187. Citing the government's "Fourth Ex Parte Submission," the court alternately imputed this alleged behavior – in seemingly interchangeable terms – to Guzman via "intermediaries" and, more vaguely, to his "organization." *Id.*

Guzman from sending or receiving messages were *designed to alleviate*.[271]

As for the first redundant restriction, barring foreigners from laying eyes on evidence the government would offer as proof of guilt precluded proper interviews and thorough investigation, compromising Guzman's right to call witnesses in his defense.[272]

Similarly, the formidable hurdles of (a) government background checks, (b) judicial approval upon notice to government lawyers with opportunity to oppose, and (c) unnerving judicial warnings upon in-court appearance would naturally deter defense counsel from approaching potential stateside witnesses – and discourage them from cooperating

[271] Supposing that "potential fact witnesses … defense counsel may interview" are "likely to be associates of the defendant or alleged members of the Sinaloa Cartel or other drug-trafficking enterprises," the court worried about the "risk" of their "gaining access to cooperating witness identifying information or information regarding law enforcement techniques." A: 109. Beyond reversing the presumption of innocence, surmising that all potential defense witnesses were criminals was fanciful. For example, what if defense counsel w*ante*d to interview an ordinary civilian to establish an alibi for a specific date and event in question?

[272] *See U.S. v. Smith*, 985 F. Supp. 2d 506, 521 (S.D.N.Y. 2013) (protective orders issued under Rule 16(d) implicate right to "compulsory process") (citation and internal quotation marks omitted).

even if contacted.[273] In effect, then, the overreaching second restriction shifted control of Guzman's defense to his government adversaries and the court, giving them a functional veto over domestic witnesses he might interview and call – and thereby denying him counsel's assistance.[274]

Finally, the third duplicative restriction – withholding essential disclosure until shortly before crucial cooperator testimony – likewise impaired meaningful investigation and effective cross-examination, amplifying the unfair advantage of the government's 10-year head start.

In mulling the entry of a protective order, courts must "balance" the government's asserted "interest in non-disclosure" against the accused's "due process" and "Sixth Amendment right to prepare and present a full

[273] *Cf.*, *E.g.*, *Webb v. Tex.*, 409 U.S. 95, 97-98 (1972) (judge's lengthy perjury admonition, "effectively" forcing star defense witness "off the stand," denied defendant due and compulsory process); *U.S. v. Morrison*, 535 F.2d 223 (CA3 1976) (same as to prosecutor's extensive perjury warnings, underlining possible risk of criminal prosecution, to key defense witness).

[274] *Cf.*, *E.g.*, *Grievance. Comm. for SDNY v. Simels*, 48 F.3d 640, 650-51 (CA2 1995) (recognizing the "overriding concern of a defendant's Sixth Amendment right to the effective assistance of counsel and a lawyer's ethical duty of zealous advocacy," and cautioning against "inhibit[ing]" or "chill[ing]" defense attorneys' "efforts to interview witnesses"; develop "strategies," "impeachment material" and exculpatory "evidence"; and perform "all sorts of [other] investigation" critical to trial "preparation").

defense at trial."[275] "Weigh[ing]" the order's projected "impact" on that seminal right, they must "ensure" that it's "no broader than … necessary" and consider "less restrictive alternatives," taking care to "minimize" the risk of "burden[ing]" defense efforts "inappropriate[ly]."[276]

For those reasons – and because the witness safety mantra is subject to abuse and manipulation[277] – "conclusory statements" and "broad allegations of harm, unsubstantiated by specific examples or articulated reasoning," fail to show good cause for issuing a protective

[275] *U.S. v. Lindh*, 198 F. Supp. 2d 739, 742-44 (E.D. Va. 2002); *accord, e.g.*, *Concord*, 404 F. Supp. 3d at 70 (balancing "government's interest in protecting sensitive discovery with [accused's] interest in preparing a full defense"); *id.* at 75 (asking if "defendant's interest in preparing a full defense outweighs the government's interests in restricting discovery"); *Smith*, 985 F. Supp. 2d at 544 (stressing need for "particular[] sensitiv[ity]" to order's "hinder[ing]" defense "efforts").

[276] *Lindh*, 198 F. Supp. 2d at 741-44 (citation omitted); *accord*, *E.g.*, *Concord*, 404 F. Supp. 3d at 72 (directing government to "propose a less restrictive protective order that would be less burdensome on the defense"); *id.* at 74-75 (noting that order must be "narrowly tailored" and "no broader than … necessary") (citation and internal quotation marks omitted); *U.S. v. Betancourt*, 17-cr-30022, 2019 WL 1767396, at *2 (D. Mass. Apr. 22, 2019); *Smith*, 985 F.3d at 524, 530, 545-46 (considering "less restrictive alternatives, such as redaction," to "ensure" that order was "no broader than … necessary") (citation and internal quotation marks omitted); *U.S. v. Carilles*, 654 F. Supp. 2d 557, 570 (W.D. Tex. 2009); *Ass'n for Reduction of Violence v. Hall*, 734 F.2d 63, 66 (CA1 1984) (instructing judges to accommodate disclosure where possible by excising privileged document sections).

[277] *See Abuhamra*, 389 F.3d at 324 & n.11.

order.[278] Instead, the government must make a "particular factual demonstration of potential harm"[279] – a "particularized and specific showing of need"[280] – by pointing to a "clearly defined, specific and serious injury" attending "disclosure."[281] In sum, good cause must be "established" with "specificity" – not merely "alleged" in "speculative language."[282]

The protective order in this case appears broader and stricter than any our research reveals, scorning the teachings just inventoried. Indeed, courts typically *reject* requests – in cases against high-profile defendants ranging from "American Taliban" John Walker Lindh[283] to a militant

---

[278] *Smith*, 985 F. Supp. 2d at 523, 530 (quoting *Wecht*, 484 F.3d at 211) (additional citations and internal quotation marks omitted), *accord*, *E.g.*, *Concord*, 404 F. Supp. 3d at 74, 77; *Betancourt*, 2019 WL 1767396, at *2.

[279] *Smith*, 985 F. Supp. 2d at 523 (citations and internal quotation marks omitted).

[280] *Betancourt*, 2019 WL 1767396, at *2 (citations omitted).

[281] *Smith*, 985 F. Supp. 2d at 523 (citations and internal quotation marks omitted); *accord*, *e.g.*, *Concord*, 404 F. Supp. 3d at 74 (requiring "particularized" good cause showing).

[282] *Smith*, 985 F. Supp. 2d at 528-29 (citations and internal quotation marks omitted); *accord*, *e.g.*, *Wecht*, 484 F.3d at 211 ("Good cause is established on a showing that disclosure will work a clearly defined and serious injury…. The injury must be shown with specificity.") (citations and internal quotation marks omitted); *Concord*, 404 F. Supp. 3d at 74, 77.

[283] 198 F. Supp. 2d 739.

anti-Castro bomber[284] – that the government and judge preclear potential fact witnesses to view protected discovery. Rather, to avoid "unduly restrict[ing]"[285] or "impermissibly burden[ing]"[286] the ability to "prepare and present a full defense,"[287] they properly choose a "less restrictive alternative":[288] signed documents[289] – sometimes filed with the court ex parte, in camera and under seal[290] – acknowledging that witnesses viewing discovery have read, understand and agree to abide by the protective order.[291]

---

[284] *Carilles*, 654 F. Supp. 2d 557.

[285] *Ibid.* at 569.

[286] *Lindh*, 198 F. Supp. 2d at 743.

[287] *Ibid.*

[288] *Ibid.* at 742 (citation omitted).

[289] *See Betancourt*, 2019 WL 1767396, at *1-*3 (involving international Mexican narcotrafficking defendants).

[290] *See Lindh*, 198 F. Supp. 2d at 742-43; *Carilles*, 654 F. Supp. 2d at 570.

[291] For one limited class of "potential witness[es]" – enemy combatants "housed primarily at Guantanamo Bay, Cuba" – *Lindh* mused that "it *may* be appropriate for the issue to be decided by the [c]ourt with notice to the government, to assure that the [c]ourt is fully apprised of the risks attendant to disclosure of unclassified protected information to a *specific* detainee." 198 F. Supp. 2d at 741, 743 (emphasis supplied). But even "[i]n this [narrow] respect," the court hastened to add, "the government will bear a *substantial burden* of demonstrating that disclosure of any *specific*, protected information to the detainee should not occur." *Id.* (emphasis supplied).

This "reasonabl[e] accommodat[ion]"[292] addresses the "[g]overnment's interests in preventing unwarranted disclosure of protected materials while only minimally affecting [d]efendant's ability to prepare for trial."[293] It enables counsel to "disclose" sensitive [information]" to potential fact "witnesses who are not pre-screened by, or known to, the government while "reasonabl[y] assur[ing]" that the information receives "adequate protection."[294] As *Carilles* cannily recognized:

> [R]equiring the [c]ourt's approval before [d]efendant may disclose protected materials in preparation for his trial would needlessly impair [a meaningful] opportunity [to present a complete defense]. Such a procedure would be time-consuming, expensive, and would essentially *require [d]efendant to keep the [c]ourt and the [g]overnment on perpetual notice of his trial preparation-related activities*. Furthermore, such a procedure is not necessary to accommodate the [g]overnment's interests.[295]

---

[292] *Lindh*, 198 F. Supp. 2d at 743.

[293] *Carilles*, 654 F. Supp. 2d at 570 (citation omitted).

[294] *Lindh*, 198 F. Supp. 2d at 743.

[295] 654 F. Supp. 2d at 569 (emphasis supplied).

At the opposite extreme, the protective order here went way beyond even the harshest ones our research turns up. Far from prohibiting all sensitive discovery review with potential foreign witnesses, the order in *Concord*, a case involving alleged election meddling by "a Russian company," allowed "the vast majority of the produced discovery [to] be viewed and discussed in Russia."[296] And neither *Concord*'s order nor that in *U.S. v. Johnson* – limited to a small batch of "electronic surveillance and search warrant materials,"[297] and likewise lacking a foreign witness ban – included what amounted to a forbidding judicial riot act requirement upon in-person court appearance.

Against the background just outlined, there was no plausible reason *not* to follow *Lindh*, *Carilles* and *Betancourt* in imposing the "less restrictive alternative"[298] of signed agreements to obey the protective order[299] – or, at the very least, permission to show potential witnesses,

---

[296] 404 F. Supp. 2d at 78; *see also id.* at 77.

[297] 191 F. Supp. 3d 363, 366-67 (M.D. Pa. 2016) (footnote, citation and internal quotation marks omitted).

[298] *Lindh*, 198 F. Supp. 2d at 742 (citation omitted).

[299] *See Concord*, 404 F. Supp. 3d at 74 (requiring Russian witnesses to sign such a "memorandum of understanding").

both here and abroad, suitably redacted versions of the protected documents.[300] After all, many alleged leaders of sophisticated criminal organizations – recall John Gotti and Vinny Basciano from **SUBPOINT II(C)(2)(a)** – are ritually accused of intimidating suspected turncoats by violent means. Yet none faced protective orders as sprawling and stunting as Guzman's. Added to the mix of other pretrial conditions and constraints, the orders' unprecedented breadth helped stymie Guzman's efforts to effectively investigate and defend through counsel.[301]

4. The District Judge Deepened the Damage to Guzman's Defense by Withholding Access, on the Government's Own Private Say-So, to Evidence It Unilaterally Declared Classified

For the final blow to Guzman's Fifth and Sixth Amendment rights to due process, a fair trial and a full defense with effective assistance of counsel, prosecutors garnered a separate protective order denying him access to supposedly "classified information" that allegedly implicated

[300] *See*, *E.g.*, *Lindh*, 198 F. Supp. 2d at 743; *Smith*, 985 F.3d at 524, 530, 545-46.

[301] *Cf. Abuhamra*, 389 F.3d at 324-25 (fair trial right trumps informant privilege as appropriate, requiring that government "identify a confidential source" who materially participated in charged crime and was "present with the accused at [its] occurrence") (citations and internal quotation marks omitted); *Aref*, 533 F.3d at 79-80 (informant privilege gives way when identity relevant and helpful to defense, a standard lower than the materiality threshold in *Brady v. Md.*, 373 U.S. 83, 87 (1963), for disclosing exculpatory evidence) (citing *Roviaro v. U.S.*, 353 U.S. 53, 60-61 (1957)).

"national security."[302] Unlike the other pretrial and substantive impediments enumerated in this **POINT**, the government won that order *entirely* – not just partially or significantly – in secret.[303] So Guzman couldn't challenge the classified tag[304] and doesn't know, save "summary substitutions" fashioned by the very prosecutors seeking his death in captivity,[305] what the disputed evidence comprised.

As the Supreme Court recently warned, "national-security concerns must not become a talisman used to ward off inconvenient claims – a label used to cover a multitude of sins."[306] This Court concurs, dubbing CIPA an "imperfect"[307] statute and cautioning against its "danger of abuse":[308]

> CIPA['s] procedures … place all parties involved (*except perhaps the government*) at a substantial

---

[302] A: 198-201.

[303] A: 199-200.

[304] *See Abu-Jihaad*, 630 F.3d at 142 (acknowledging "defense's limited ability to participate in … CIPA proceedings").

[305] *See U.S. v. Moussaoui*, 382 F.3d 453, 477-79 (CA4 2004) (finding government-authored summary substitutions "inadequate").

[306] *Ziglar*, 137 S. Ct. at 1862 (citation and internal quotation marks omitted).

[307] *Stewart*, 590 F.3d at 132.

[308] *Ziglar*, 137 S. Ct. at 1862 (citations and internal quotation marks omitted).

> disadvantage: *defendants are hampered in contesting the assertions that are being made to the court by the government*; district courts and courts of appeals are deprived of the opportunity for an adversarial proceeding upon which they are typically dependent in attempting fairly and properly to resolve disputes; and the public, as well as the litigants, are deprived of the assurances that come with public scrutiny of the work of the courts. *The procedures are also, of course, subject to abuse by the executive*.[309]

For those reasons and others, CIPA and its common law precursor – the state secrets privilege, criminally inapplicable in any event[310] – must bow to the accused's "right to present a meaningful defense"[311] where information the government would withhold is "relevant and helpful to the defense."[312] And that standard, in turn, is lower than *Brady*'s[313] materiality test triggering the duty to disclose exculpatory

---

[309] *Stewart*, 590 F.3d at 132 (emphasis supplied).

[310] *Cf. Aref*, 533 F.3d at 79.

[311] *Ibid.*; *accord*, *e.g.*, *Abu-Jihaad*, 630 F.3d at 141; *Stewart*, 590 F.3d at 131.

[312] *Aref*, 533 F.3d at 79.

[313] *See ante* n.301.

evidence.[314] For "information can be helpful" in the CIPA context "without being 'favorable' in the *Brady* sense."[315]

Here, the district court strikingly found – *even without defense input* – that the purportedly classified evidence indeed contained "information that arguably may be helpful or material to [Guzman's] defense."[316] This Court's cases thus mandated disclosure,[317] and the district court erroneously refused it on that ground alone.[318]

And in broader terms, the government's "*sole*" reliance on "*ex parte* submission[s]" – as opposed to "use of *ex parte* evidence to *corroborate* testimony offered in open court" – raises its own alarms.[319] That's because "court rulings made *entirely* on secret evidence" present "serious due process" problems.[320]

---

[314] *See Aref*, 533 F.3d at 80; *Abu-Jihaad*, 630 F.3d at 141 n.33.

[315] *See Aref*, 533 F.3d at 80; *Abu-Jihaad*, 630 F.3d at 141 n.33 (both quoting *U.S. v. Mejia*, 448 F.3d 436, 457 (D.C. Cir. 2006)) (internal quotation marks omitted).

[316] A: 200.

[317] *See ante* nn. 311-12.

[318] *Cf. Aref*, 533 F.3d at 80-81 (agreeing that district court "did *not* deny the defendants any helpful evidence") (emphasis supplied).

[319] *Abuhamra*, 389 F.3d at 326 (emphasis supplied).

[320] *Ibid.* 325.

At the very least, then, withholding concededly helpful information on wholly private national security claims – potentially talismanic if not abusive – exacerbated the appearance of unfairness surrounding all the other pretrial restrictions and defense restraints Guzman endured. Equally disquieting, it aggravated the appearance of impropriety attending their imposition substantially in secret.[321]

That's especially true where Guzman attempted no tactical "graymail" – CIPA's paramount concern – by "pressing for the release of sensitive classified information" to force a government dismissal.[322] To the contrary, the government initiated CIPA proceedings on its own accord, totally unbidden by anything attributable to the defense.

D. CONCLUSION

Our legal system prizes the adage "justice must satisfy the appearance of justice."[323] What good is either if we conveniently sweep

---

[321] *Cf. In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 93, 115-30 (CA2 2008) (spurning as-applied constitutional challenges to distinct CIPA provisions where counsel – though not client – received access to ostensibly classified material adjudged non-discoverable regardless).

[322] *See U.S. v. Pappas*, 94 F.3d 795, 799 (CA2 1996) (citation, footnote and internal quotation marks omitted).

[323] *In re Murchison*, 349 U.S. 133, 136 (1955).

that imperative aside – paying it mere lip service – where the defendant is popularly demonized, vilified and caricatured? Where guilt is widely taken for granted, the outcome commonly seen as a formality?

No good at all. The adage is little more than a conceit, an exercise in self-flattery. And the system is little better than those of ostensibly less enlightened nations for whom we fancy ourselves and our own a model.

Banishing a presumptively innocent man to 30 months of psychologically damaging and physically grueling solitary confinement[324] – before convicting him of anything – does not satisfy the appearance of justice or the reality of a level playing field. Especially when the events giving rise to the barbaric pretrial punishment occurred on lax foreign shores and the defendant's post-arrest American behavior was undisputedly impeccable.

Limiting and denying access to evidence a man needs to defend himself and the law entitles him to do not satisfy the appearance of

[324] Importantly, Guzman's cruel and inhumane prison conditions – permanent isolation, a form of mental and physical torture, foremost among them – continue post-conviction. And barring reversal, they will prevail until the day he dies – a situation not yet ripe for judicial redress. *See Yousef*, 327 F.3d at 165.

justice or the reality of a level playing field. Nor does constructively denying access to witnesses he needs for the same purpose.

Inflicting all those harms largely behind closed doors – wholly or partly by secret proceedings the man can't attend or contribute to, conducted on private papers he can't see, read or answer – certainly doesn't satisfy the appearance of justice or the reality of a level playing field. Much less does bootstrapping still more secrecy and additional restrictions from those illicitly deployed and imposed in the first place – no matter how abhorrent or culpable the court of public opinion may prejudge the man.

And all the preceding hardships combined emphatically do not satisfy the appearance of justice or the reality of a level playing field. Instead, they sabotaged Guzman's fundamental rights to counsel, a defense and due and compulsory process, precluding a fair trial and demanding a new one.

After all, "the end" never "justifies the means" in administering our "criminal law."[325] Holding otherwise – condoning excessive and punitive

[325] *Olmstead v. U.S.*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

pre-conviction confinement conditions and restrictions scuttling the basic ability to defend – would "bring terrible retribution."[326]

POINT III

THE DISTRICT COURT PREJUDICIALLY ERRED IN SUSTAINING CCE VIOLATION 27 – PURPORTING TO CHARGE A DRUG-RELATED MURDER CONSPIRACY – AND ADMITTING EXCESSIVE EVIDENCE OF GRAPHIC VIOLENCE IN SUPPORT

Violation 27[327] of Count One's continuing criminal enterprise charge accused Guzman of conspiring to kill – in the course of the CCE and the drug conspiracies alleged as counts Two through Four – persons "pos[ing] a threat to the Sinaloa Cartel," contrary to 21 U.S.C. §§ 848(e)(1)(A) and 846.[328]

Guzman moved pretrial to strike Violation 27, arguing partly that § 848(e)(1)(A) is a penalty provision, not a separate criminal proscription.[329] As the district court noted, that issue is "[un]decided" in

---

[326] *Ibid*.

[327] Though numbered Violation 85 in the operative indictment, the charge went to the jury as Violation 27. *E.g.*, A: 66 ¶ 13; A: 594.

[328] A: 66 ¶ 13.

[329] *E.g.*, ECF 231 at 3-4 (5/15/18); *id.* 274 at 6-8 (7/24/18); *id.* 300 (9/4/18).

this Court.[330] And the subsection's plain title – "'Death Penalty'" – tends to support Guzman's position.[331]

But the bottom line, the court said, is this: Section 848(e)(1)(A), in theory, raises both (A) the *maximum* allowable penalty for CCE (Count One) to death from life in prison and (B) the mandatory *minimum* penalty for each of the subsidiary drug conspiracies (counts Two through Four) to 20 years from 10.[332] Invoking the Supreme Court's sentencing keystones from the earlier 2000s, the court thus recognized that "[t]he Sixth Amendment [generally] requires that any fact (other than the fact of a prior conviction) that increases the statutory maximum or minimum penalty for an offense be proven to the jury beyond a reasonable doubt."[333]

---

[330] A: 347.

[331] A: 312 ("the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute and a title that contains the word 'penalties' more often, but certainly not always, signals a provision that deals with penalties for a substantive crime") (quoting *Almendarez-Torres v. U.S.*, 523 U.S. 224, 234 (1998)) (additional citations, alterations and internal quotation marks omitted).

[332] A: 347-49 & nn. 2-3.

[333] A: 347 (citing *Alleyne v. U.S.*, 570 U.S. 99, 115 (2003); *Apprendi v. N.J.*, 530 U.S. 466, 476 (2000)); *see also*, *e.g.*, *U.S. v. Booker*, 543 U.S. 220 (2005); *Blakely v. Wa.*, 542 U.S. 296 (2004).

At the same time, though, the court perceptively observed that the Sixth Amendment's protections – and the *Apprendi* line of cases implementing them – are a one-way ratchet, intended solely to benefit the *defendant*, ***not*** the government.[334] Accordingly, because Guzman's extradition conditions foreclosed capital punishment as a factual matter,[335] the court properly discounted the "abstract" possibility of an increased maximum CCE penalty – death – as a legal fiction in this case.[336] And the court wisely refused to let that fiction turn Guzman's Sixth Amendment "shield" into a government "sword" licensing the "introduc[tion]" of otherwise inadmissible murder and violence evidence.[337]

Oddly, however, the court bypassed the pro-defendant purpose of both the Sixth Amendment and the *Apprendi* line in its primary holding:

---

[334] A: 348 n.3; *see* U.S. Const. amend. VI (listing rights the "accused" enjoys in "criminal prosecutions," including right to "trial" by "jury").

[335] *See*, *e.g.*, ECF 17 at 16 & n.5 (1/20/17).

[336] A: 347-48 & n.3.

[337] *Ibid.* n.3.

that *Alleyne*[338] allowed the government to plead and prove Violation 27 regardless.[339] Why? In the court's view, "§ 848(e) *d[id]* increase the mandatory minimum liability" Guzman "face[d] for Counts Two through Four" – the subsidiary drug conspiracies – "from 10 years' imprisonment to 20."[340]

Leaving aside the Sixth Amendment oversight just mentioned, that suggestion was no less a mirage than the prospect of a death sentence on Count One's CCE charge. How come?

First, as the district court conceded, Guzman already "face[d] a mandatory minimum of 20 years' imprisonment and the possibility of a life sentence if convicted of a continuing criminal enterprise in Count One."[341]

Second, counts Two through Four, the subsidiary drug conspiracies, were lesser included offenses of the Count One CCE.[342] So

---

[338] *See* 570 U.S. at 103 ("any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury").

[339] *See* A: 347.

[340] A: 348.

[341] A: 347-48 (citation and footnote omitted).

[342] *See Rutledge v. U.S.,* 517 U.S. 292 (1996).

Rutledge would merge any conviction on the former with one on the latter to avoid double jeopardy concerns.[343] And that's exactly what happened at sentencing; the court "vacated" the subsidiary drug conspiracy convictions and "dismissed" counts Two through Four.[344]

Third, there was next to no chance – and certainly no substantial chance – that a rational jury would convict Guzman of a subsidiary conspiracy without also finding him guilty of the greater Sinaloa Cartel CCE. As the district court elsewhere remarked: "I really do not think I have to give [a multiple conspiracy] charge. I think the [g]overnment has put in sufficient evidence where the single proof of the conspiracy the way it has charged it."[345]

In the circumstances presented, then, the likelihood that Violation 27 would actually affect Guzman's minimum exposure on counts Two through Four was vanishingly remote – somewhere between slim and none, approaching zero. And in all events, that largely academic scenario was too thin a reed to support inundating the jury with evidence of dozens

---

[343] *Ibid.*

[344] A: 599.

[345] T. 6464.

of "kidnappings, acts of torture, murders and attempted murders."[346] It follows that Violation 27 should have been stricken, evidence of it precluded or both – on the district court's own logic as to the Count One CCE's maximum penalty.

Alternatively, even assuming Violation 27 was improperly alleged, the court found the underlying violence preliminarily admissible – subject to Fed. R. Evid. 403 considerations – as direct evidence of the charged CCE and/or extrinsic proof of uncharged acts under Rule 404(b).[347] Maybe so – at least as to *some* evidence of violence.

But the government submitted to the jury no fewer than *26* vicious murder conspiracies, spanning a 25-year period, in support of Violation 27[348] – a tail wagging the dog of the central drug crimes if ever there was one. Even the court called the orgy of violence a "close [403] question,"[349] worrying that the government was "piling on"[350] and rapping it for

[346] ECF 292 at 43 (8/25/18).

[347] A: 344, 350-54.

[348] ECF 566 at 2-3 (1/28/19).

[349] T. 5887-88.

[350] *Ibid.* at 5888.

displaying a literal arsenal before the jury in an "unnecessarily prejudicial" "weapons show."[351]

Absent the fallacy that *Alleyne* – and a mythical minimum sentence enhancement on counts Two through Four – required the government to plead and prove Violation 27, the court surely would've moderated the violence evidence in extent and degree, barring significant portions under Rule 403 as cumulative and unfairly prejudicial. What's more, any such evidence allowed under Rule 404(b) would have carried an appropriate limiting instruction, presumed to be obeyed by the jury.[352]

But that's only half the story. In discretionary rulings favoring the government, the court typically found proffered evidence insufficiently prejudicial to warrant exclusion "considering the seriousness of the crimes [charged] here."[353] Assuming competence and relevance – a "[very] low threshold"[354] – that approach invited blanket admission of virtually any non-hearsay item imaginable.

---

[351] *Ibid.* at 3886-87, 3909-10; *see also Guzman Loera*, 2019 WL 2869081, at *15.

[352] *E.g.*, *U.S. v. Downing*, 297 F.3d 52, 59 (CA2 2002).

[353] *E.g.*, A: 398-99.

[354] *U.S. v. Gramins*, 939 F.3d 429, 450 (CA2 2019) (citations and internal quotation marks omitted).

After all, what could be "more inflammatory,"[355] "sensational or disturbing"[356] than the 26 brutal murders and murder conspiracies underpinning Violation 27? In fact, the court dusted off a similar refrain – nothing's as "gruesome" or "prejudicial" as the "overwhelming amount of evidence that the jury heard and saw about defendant threatening, torturing, and murdering people"[357] – to summarily deny Guzman's post-verdict retrial motion alleging jury malfeasance.[358]

In that light, misconstruing the need to plead and prove Violation 27 – for phantom sentence enhancement purposes – colored *all* the district court's precatory determinations, incalculably infecting its countless exercises of discretion and contaminating the entire prosecution. When a court admits "numerous uncharged" wrongs, the

---

[355] *Ante* n.346 at 47 ("probative value" routinely found to outweigh "prejudicial effect" where "uncharged acts" are no "more inflammatory than the charged crime") (citing *U.S. v. Baez*, 349 F.3d 90, 94 (CA2 2003); *U.S. v. Livotti*, 196 F.3d 322, 326 (CA2 1999)).

[356] *U.S. v. Pitre*, 960 F.2d 1112, 1120 (CA2 1992) (Rule 403 asks partly if proffered evidence is "more sensational or disturbing than the [charged] crimes").

[357] *Guzman Loera*, 2019 WL 2869081, at *15.

[358] *See* **POINT IX**.

"collective effect" at "some point" becomes an inescapable "suggest[ion of] criminal propensity."[359] So too in this case.

To that end, it was no coincidence that the government's main summation opened with a flourish, dramatically rehearsing one of the grimmest alleged murders said to undergird Violation 27.[360] Meanwhile, swarms of other violent episodes dotted if not dominated the summation's balance,[361] with the jury requesting and receiving a readback of

---

[359] *U.S. v. Basciano*, No. 03-cr-929, 2007 WL 1791221, at *3 (E.D.N.Y. Jun. 19, 2007).

[360] T. 6516-17 ("High in the mountains of Sinaloa, a bonfire roared in what would become a shallow grave. Two men lay in front of the fire beaten almost to death but still breathing. The defendant, Joaquin Guzman Loera, was surrounded by his underlings. He leveled his rifle at the head of one of the men, he cursed him, and then he shot him. The second man would soon share the same fate. When the defendant was done, he turned to his worker, Memin, and said toss them in the bonfire. Why did the defendant torture and murder these two men? Well, it was because they were from a rival drug trafficking organization, a rival cartel. And the defendant was incensed that these two men, who came from his home state of Sinaloa, would work for a rival cartel and not help him.").

[361] *Ibid.*, *e.g.*, 6557-61 ("[H]ow else did the defendant run his cartel? Violence, kidnapping, torture, murder…. [W]hat was violence used for in the cartel? Many things. Taking over territory, interrogating rivals, starting wars, ro[o]ting out insiders who were cooperating against the defendant, punishing those that the defendant suspected of stealing from him, or anyone who would disobey or failed to follow his orders. It didn't matter who it was. The defendant gave the orders and they were carried out, and he had a group of henchmen, hundreds involved, to carry out these orders. Witnesses including [naming seven], they told you about the numerous acts of violence committed by the defendant."); *id.* 6662-78 (reviewing in excruciating detail some 11-16 separate murders and murder conspiracies, claimed to target suspected "informants" and cartel "enemies," that anchored Violation 27; "Remember Isaias [Memin] Valdez's chilling testimony about the defendant, what the defendant did to people, specifically Sinaloans, who dared to join the Zetas? They didn't just end

testimony from a witness billed as a chief Guzman enforcer.[362] On this record, the errant ruling allowing the government to plead and prove Violation 27 worked undeniable harm, spoiling Guzman's conviction.

POINT IV

THE GOVERNMENT UNREASONABLY INTERCEPTED, SEARCHED AND SEIZED INCULPATORY FOREIGN PHONE CONVERSATIONS ASCRIBED TO GUZMAN, VIOLATING THE FOURTH AMENDMENT AND COMPELLING SUPPRESSION

Starting around 2009, Guzman allegedly communicated with supposed confederates electronically – by telephone, email and text message – over a private, encrypted digital network run through the internet.[363] A "computer engineer" who began proactively cooperating with the government in Feb. 2011 and later testified at trial, Christian Rodriguez, designed, built and managed the system at Guzman's putative instance.[364] At some point the government directed Rodriguez to

---

up dead, they ended up beaten until they were rag dolls. They ended up murdered at the defendant's own hands. They ended up meeting their end in a gri[s]l[y] bonfire, their bones reduced to dust.").

[362] *Ibid.* 7076.

[363] A: 223-24.

[364] A: 223, 225; ECF 263 at 3 (7/9/18); A: 321, 323.

move the computer servers controlling the network to Holland from Canada.[365]

From Mar. 2011 through Jan. 9, 2012, U.S. authorities – aided by their Dutch counterparts via Mutual Legal Assistance Treaty requests – conducted surveillance and searches of network communications.[366] Though the surveillance purportedly targeted "three [primary] servers,"[367] only two – bearing Internet Protocol addresses ending in 226 and 70 – were actually "used" by alleged cartel members.[368]

Collectively, the surveillance took three distinct forms: (1) live interception, per Dutch wiretap warrants, and contemporaneous government monitoring of communications routed through the target servers; (2) Rodriguez' accessing the servers personally, recording calls and emailing them to the FBI – all without a warrant, at the

[365] A: 226, 330.

[366] A: 226-29 & n.9, 246, 254, 256-57 & n.17, 322-23 n.1.

[367] A: 227-28.

[368] T. 4729, 4731. In all, it appears the government submitted some 18 MLAT requests covering network equipped hardware pieces with IP addresses ending as follows: 226; 227; 70; 190; 231; 4. A: 207 & nn. 6-7; ECF 264 at 6 (7/9/18).

government's direction; and (3) seizure, per Dutch search warrants, of communications stored on the servers.[369]

According to case agent Stephen Marston, testifying for the government at trial, the Dutch server surveillance netted hundreds of calls that the prosecution imputed to Guzman.[370] During those calls, he assertedly "discuss[ed] trafficking cocaine and methamphetamine into the United States. He also discuss[ed] acts of violence committed by members of [the c]artel, payments to corrupt police officers and efforts to evade law enforcement detection."[371] The district court rated this evidence – of "defendant's own voice on recorded tapes talking about drugs" – highly damaging, stressing a jury note "requesting playback of one."[372]

---

[369] A: 227-29, 322.

[370] T. 4493, 4516.

[371] A: 229.

[372] *U.S. v. Guzman Loera*, No. 09-cr-0466, 2019 WL 2869081, at *1, *3, *15, *19 (E.D.N.Y. July 3, 2019).

Guzman moved before trial to suppress the Dutch server tapes, arguing the government violated the Fourth Amendment in acquiring them.[373] The district court denied the motion.[374]

Amid his trial testimony, however, Marston revealed that some portion of the inculpatory calls attributed to Guzman came from an IP address different from those of the servers the Dutch surveillance – and the defense suppression motion – targeted.[375] That IP address ended in 103 – not 226, 70[376] or any of the other suffixes the MLAT requests covered.[377] Asked why that was, Marston confessed that he couldn't explain the discrepancy, never identifying the calls' provenance or how the government had gotten them.

It appears those calls were acquired in violation of the Fourth Amendment and should've been excluded. That conclusion obtains for a volley of reasons:

---

[373] ECF 264.

[374] A: 319.

[375] T. 4729-34.

[376] T. 4733-34.

[377] See *ante* n.368.

1. Though Guzman was a nonresident alien and the government presumably gathered the evidence abroad, he had "vountar[il]y attach[ed]" himself "to the United States."[378]

a. Over a multi-year period, Guzman purchased and established "dozens" of commercial software licenses and accounts enabling him to surreptitiously "monitor the communications of several … girlfriends."[379] Data from the monitored devices was collected and stored on an Amazon cloud server in Washington State.[380] Guzman "regularly accessed" the Washington data through the website of a company in Texas, Cloudflare.[381]

b. More generally, Guzman, an alien "lawfully present in the United States," is among the "'people' … entitled to the protection of the Bill of Rights, including the Fourth Amendment. [He] is

---

[378] *U.S. v. Hasbajrami*, 945 F.3d 641, 662-63 (CA2 2019) (quoting *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990)).

[379] A: 224-25, 229-30 & n.10.

[380] A: 224-25, 231.

[381] A: 226.

surely such a person even though … brought and held here against his will."[382]

2. As the district court recognized, Guzman – having taken elaborate steps to encrypt his "communication network" precisely to avoid "[g]overnment interception" – had a "subjective expectation of privacy in the communications made on the system."[383]

a. Guzman's status as "an escapee from [*Mexican*] prison[s]"[384] did not render that expectation objectively unreasonable where, as here, the surveillance was conducted, directed and controlled by *American* law enforcement authorities.[385] One thing simply has nothing to do with the other. If "[a] warrant issued by a U.S. court" is a "nullity" for purposes of enforcement in Mexico,[386] the corollary – a Mexican jailbreak and arrest warrant don't transform the absconder into

---

[382] *Verdugo-Urquidez*, 494 U.S. at 279 (Stevens, J., concurring in judgment).

[383] A: 327.

[384] *Ibid.*; *see U.S. v. Roy*, 734 F.3d 108, 111 (CA2 1984).

[385] *See ante* n.366.

[386] *See In re Terrorist Bombings*, 552 F.3d at 171.

an escapee from a U.S. prison for Fourth Amendment standing purposes – follows ineluctably.

b. Authorizing third-party IT administrator Rodriguez to access and maintain the network[387] – thus assuring basic connectivity and functionality – no more vitiated Guzman's privacy interest as interceptee than would an operator or phone company's line access in the domestic wiretap context.[388] Both are matters of technical necessity.[389]

3. Intercepting otherwise private conversations whose acquisition the government is conspicuously unable to "explain"[390] constitutes a patently unreasonable search and seizure.[391] As this Court remarked in a similar setting:

> It cannot be denied that [defendant] suffered, while abroad, a significant invasion of privacy by virtue of the government's year-long [covert]

---

[387] A: 328.

[388] *Cf. Alderman v. U.S.*, 394 U.S. 165, 176 (1969).

[389] Relatedly, the district court did not accept the prosecution's argument that Rodriguez validly consented to searches he "conducted" as a confidential informant at the government's "direction." A: 328 n.2.

[390] T. 4374.

[391] *See In re Terrorist Bombings*, 552 F.3d at 159, 171.

> surveillance of his telephonic communications. The Supreme Court has recognized that, like a physical search, electronic monitoring intrudes on the innermost secrets of one's home or office and that few threats to liberty exist which are greater than that posed by the use of eavesdropping devices.[392]

It follows that Guzman experienced a great "intrusion" meriting "substantial weight."[393]

4. Suppression is appropriate because the government controlled and directed the foreign surveillance, the Dutch merely acting as its agent.[394] At the very least, the surveillance was the product of a joint venture between the two sovereigns.[395]

5. Good faith can't redeem the calls from the 103 IP address. A search and seizure whose origin and source defy explanation is so "facially deficient that reliance upon it[s fruits] is unreasonable."[396]

---

[392] *Ibid.* at 173, 175 (citations, internal quotation marks and alteration omitted).

[393] *Ibid.* at 175-76.

[394] *See U.S. v. Getto*, 729 F.3d 221, 230-31 (CA2 2013); *U.S. v. Lee*, 723 F.3d 134, 140-11 (CA2 2013); *ante* n.366.

[395] *Cf. Getto*, 729 F.3d at 233; *Lee*, 723 F.3d at 140 n.4.

[396] *Cf.*, *e.g.*, *U.S. v. Galpin*, 720 F.3d 436, 452 (CA2 2013) (citations omitted).

Because the damning 103 calls were unconstitutionally obtained and improperly admitted, this Court must reverse Guzman's conviction. At a minimum, it should remand for reopened suppression proceedings based on Marston's trial testimony.[397] To the extent counsel didn't renew the suppression motion or seek to reopen the proceedings upon that testimony, they provided ineffective assistance in failing to do so.[398]

[397] *Cf. U.S. v. Hamilton*, 538 F.3d 162, 167-70 (CA2 2008).

[398] Mr. Guzman personally wishes to tell the Court this: "From the 117,000 calls that the government gave to defense counsel, there was no calls with Guzman's voice in it (with Guzman speaking). The calls they presented at the trial that the government alleges had Guzman speaking, those calls did not have a judge's order, since they come from the IP that ends in 103. The government told the jury during closing arguments that those calls they presented at trial, they had a judge's order/warrant, but that was not true. That is very serious, since they confused the jury. The jury took into account what the prosecutor said during their closing argument about those calls. This was a very big fraud. Also, [government witness Pedro] Flores said the voice on the call and the voice on the video [exemplar – both supposedly Guzman's –] were different [T. 3658, 3755]."

POINT V

THE GOVERNMENT VIOLATED THE FOURTH AMENDMENT AND CRIMINAL RULE 41 BY UNLAWFULLY SEARCHING AND SEIZING – FROM DOMESTIC SOURCES -- INCULPATORY TEXT MESSAGES ASCRIBED TO GUZMAN, DICTATING SUPPRESSION

From around 2009 through 2012, Guzman allegedly had Rodriguez purchase and establish "dozens" of commercial software licenses and accounts enabling him to secretly "monitor the [electronic] communications of several … girlfriends."[399] As indicated, data from the monitored devices – cellphones and computers[400] – was collected and stored on an Amazon cloud server in Washington State.[401] Guzman – on his own and via Rodriguez and other "technicians"[402] – "regularly accessed" the Washington data through the website of a company in Texas, Cloudflare.[403]

---

[399] A: 223-25, 229-30 & n.10.

[400] *E.g.,* T. 4822-24, 4829.

[401] A: 224-25, 231.

[402] *E.g.*, T. 4826, 4828, 4830-31; *cf.* T. 4851.

[403] A: 226.

In Dec. 2011 and Jan. 2012, informant Rodriguez – acting at the government's direction – logged onto Cloudflare's Texas-based website and downloaded "text messages" and "other data" from the subject accounts.[404] The information was then transferred to an FBI server and burned onto DVDs.[405] All this occurred without a warrant.[406] The government subsequently obtained warrants to review the DVDs' contents.[407]

Later, in Feb. 2012, the government obtained Manhattan federal warrants purporting to authorize acquisition of similar data from the subject accounts directly from the Amazon cloud server – again by way of Cloudflare's Texas site – storing it in Washington.[408] The warrants were renewed eight more times, through Aug. 2012.[409]

In the government's telling, all these searches together yielded "months' worth of text" messages where Guzman "discusse[d] trafficking

---

[404] A: 230.

[405] *Ibid.*

[406] *Ibid.*

[407] *Ibid.*

[408] A: 229, 231-32.

[409] A: 229-30, 232 nn. 10, 12.

drugs into the United States and other countries. He also discusse[d] narrowly escaping Mexican authorities' raid of one of his residences in Cabo San Lucas, Mexico in approximately February 2012."[410] The district court again considered this evidence that the "jury read" – "defendant's text messages sent over what he thought was a secure communication system … concern[ing] his widespread narcotics trafficking operation" – highly damaging.[411]

The text messages, however, were unlawfully obtained and should have been excluded.

A. THE GOVERNMENT CONDUCTED UNREASONABLE SEARCHES AND SEIZURES, VIOLATING THE FOURTH AMENDMENT, BY WARRANTLESSLY ACCESSING AND DOWNLOADING GUZMAN'S TEXT MESSAGES FROM THE TEXAS SITE

As the district court determined, the government carried out warrantless domestic searches – if not warrantless domestic seizures – cognizable under the Fourth Amendment when it directed cooperating agent Rodriguez to access, copy and download from Cloudflare's Texas

[410] A: 233.

[411] *Guzman Loera*, 2019 WL 2869081, at *1, *15.

site the digital contents of Guzman's commercial software accounts.[412] That determination is decisive, compelling the conclusion that the searches were unconstitutional and their fruits inadmissible.

1. As the government conceded, warrantless searches and seizures are presumptively unreasonable.[413]

2. And as explained in the previous **POINT**, neither Guzman's escape from *Mexican* prisons nor his deputizing technical experts to set up, maintain and monitor the software system diminished his privacy interest in its contents vis-à-vis searches performed by *American* authorities *in* America.[414] To the contrary, the government – in directing Rodriguez to abuse his access to the system and disseminate its contents to parties and for purposes Guzman never authorized – may well

---

[412] A: 331-33.

[413] A: 247 [citing and quoting *U.S. v. Barner*, 666 F.3d 79, 82 (CA2 2012) (citations and internal quotation marks omitted)].

[414] *Compare ante* 108-09 *and* T. 4827 (Rodriguez testifying that job duties included troubleshooting and technical support for commercial software system) *and* T. 5057-58 *with* A: 333.

have violated the Computer Fraud and Abuse Act,[415] a serious federal crime.

3. No exigent circumstances – specifically, no potential destruction of the accounts' "electronic data"[416] – excused the warrantless acquisition of their contents.

a. Contrary to the district court's supposition, the government never claimed that Guzman and his reputed "co-conspirators had deleted" or "sometimes deleted" data from the commercial software accounts "*before*" or "*[w]hen*" the FBI directed Rodriguez to illicitly "copy" it.[417] Rather, the most the government summarily alleged – without citation, substantiation or elaboration – was that Guzman "and/or" his technicians "did delete" data "on the Amazon cloud server" *at some unidentified point* "during the course of the FBI investigation."[418]

b. With no case-specific, pre-search threat of evidence destruction, only this truism remained: "The risk that electronic

---

[415] *See* 18 U.S.C. § 1030(a)(2)(C) & (a)(4) (punishing those who "exceed[] authorized access" to "protected computer[s]").

[416] A: 334.

[417] *Ibid.* (emphasis supplied).

[418] A: 269.

data might be destroyed is of course frequently present."[419] But that trope dispels itself. If it sufficed to show exigent circumstances, the government could execute warrantless digital searches and seizures as a matter of routine, effectively nullifying the Fourth Amendment in the electronic evidence context.

4. Finally, the initial warrantless searches tainted the ensuing warranted ones of the DVDs ultimately containing the data.[420] After all, "Cloudflare did not possess the data and … due to the nature of how cloud servers store the data, it would [have] be[en] extremely difficult, and potentially impossible, for Amazon to [have] locate[d] the requested data, even with … usernames and passwords for the accounts."[421] It thus appears – by the prosecutors' own admission – that the government never would have gotten the data but for the antecedent warrantless searches the FBI illegally ordered Rodriguez to conduct.

---

[419] A: 334.

[420] *Contra* A: 334-35.

[421] A: 230 (citation and internal quotation marks omitted).

B. MANHATTAN FEDERAL COURTS HAD NO POWER TO ISSUE SEARCH WARRANTS FOR ELECTRONIC DATA LOCATED ACROSS THE COUNTRY IN WESTERN WASHINGTON

As Judge Cogan acknowledged, nothing in the 2012 version of Fed. R. Crim. P. 41 authorized "a magistrate judge in the Southern District of New York" to issue a warrant "for electronic data located in the Western District of Washington."[422] Judge Cogan opined, however, that "the Stored Communications Act, 18 U.S.C. § 2701," independently validated the out-of-district digital searches in question.[423] We disagree.

1. The government did not seek – and the Manhattan judge(s) didn't issue – the Feb. 2012 warrant (or any of its successors) under the SCA.[424] Nowhere did the warrant, warrant application or

---

[422] A: 338-39 & n.9. Rule 41 was since amended to allow extraterritorial digital warrants under narrow conditions lacking here. A: 339 n.9; *see U.S. v. McGuire*, No. 16-cr-00046, 2017 WL 1855737, at *9 (D. Nev. Feb. 9, 2017), *rept. and recommend. rejected on other grounds,* 2018 WL 709961 (D. Nev. Feb. 2, 2018).

[423] A: 339.

[424] *Cf., e.g., McGuire*, 2017 WL 1855737, at *9 (Rule 41(b) "do[es] not apply to warrants issued under" or "pursuant to" § 2703); *U.S. v. Bundy*, 195 F. Supp. 3d 1170, 1173 (D. Or. 2016) (Rule 41's "territorial limitation … does not limit warrants issued pursuant to § 2703"); *U.S. v. Kanodia*, No. 15-cr-10131, 2016 WL 3166370, at *3 (D. Mass. Jun. 6, 2016) (highlighting that government "applied for" contested warrant "pursuant to Rule 41 and the Electronic Communications Privacy Act …, 18 U.S.C. § 2703") (emphasis supplied); *U.S. v. Scully*, 108 F. Supp. 3d 59, 83 (E.D.N.Y. 2015) (concluding that challenged electronic search warrants, "both of which specifically

supporting affidavit even mention the SCA or cite 18 U.S.C. §§ 2703 or 2711(3)(A)(i), the provisions vesting relevant issuing authority in any court with "jurisdiction over the offense being investigated."[425] Rather, the government sought and obtained the warrant exclusively under "Rule 41 of the Federal Rules of Criminal Procedure"[426] – specifically, "Fed. R. Crim. P. 41(c)."[427]

2. Even if the warrant *had* been sought or obtained under the SCA, it wasn't issued in compliance with "the procedures described in the Federal Rules of Criminal Procedure."[428] No controlling precedent exempts Rule 41(b)'s geographic restrictions from that SCA obligation.[429] And this Court should not exclude them in the first instance.

a. In holding otherwise, the district court purported to distinguish what it termed "venue requirements [in] Rule 41(b)" from

---

referenced Section 2703(b), complied with the requirements of the SCA") (emphasis supplied).

[425] *See* A: 290-310.

[426] A: 294-95 ¶ 2.

[427] A: 293.

[428] 18 U.S.C. § 2703(a)-(b)(1)(A).

[429] *But see, e.g.*, *U.S. v. Bansal*, 663 F.3d 634, 662 (CA3 2011); *U.S. v. Berkos*, 543 F.3d 392, 397-98 (CA7 2008).

"process-related requirements, such as those in Rule 41(d), (e), and (f)."[430] This "novel"[431] approach collapses under scrutiny.

i. For one, it confounds Rule 41's plain language and structure. After all, Rule 41(d) expressly references and partially incorporates "Rule 41(b)."

ii. For another, insofar as "'procedure'" connotes "the 'specific method' or 'particular way' to issue a warrant,"[432] application to and execution by a proper judge – one Rule 41(b) empowers to issue it – certainly comport with that definition.

b. More fundamentally, the broader premise and underlying rationale of the leading out-of-circuit case – "warrants issued pursuant to § 2703(a) do not directly infringe upon the personal privacy of an individual, but instead compel a service provider to divulge records maintained by the provider for the subscriber"[433] – miss the mark.

---

[430] A: 339.

[431] *In re App.*, 849 F. Supp. 2d 526, 575 n.30 (D. Md. 2011).

[432] *Berkos*, 543 F.3d at 398 (footnote omitted).

[433] *Ibid.* n.6.

i. As an initial matter, *Berkos*'s gloss sells § 2703(a) substantially short, blinking the reality that it expressly allows access to the "***[c]ontents* of wire or electronic communications**"[434] – not mere "records."[435]

ii. In turn, the conclusion arising from the latter fallacy – § 2703(a) warrants don't "directly infringe upon personal privacy"[436] – flatly contradicts this Court's understanding that the SCA "focuses" on "*protecti[ng]*" that very thing: "user privacy."[437] As this Court elaborated:

> [T]he most natural reading of … the [SCA] suggests a legislative focus on the privacy of stored communications. Warrants under § 2703 must issue under the Federal Rules of Criminal Procedure, whose Rule 41 is undergirded by the Constitution's protections of citizens' privacy against unlawful searches and seizures. And more generally, § 2703's warrant language appears in a

---

[434] The quote comes from § 2703(a)'s subheading. We added italics.

[435] *See ante* n.433.

[436] *Ibid.*

[437] *In re Microsoft*, 829 F.3d 197, 218 (CA2 2016) (emphasis supplied), *rehg. en banc denied*, 855 F.3d 53 (CA2 2017), *vacated as moot on other grounds*, 138 S. Ct. 1186 (2018). Though the *en banc* filings generated several separate opinions, none disputed privacy's importance under the SCA.

> statute entitled the Electronic Communications Privacy Act, suggesting privacy as a key concern.
>
> The overall effect is the embodiment of an expectation of privacy in those communications, notwithstanding the role of service providers in their transmission and storage…. Accordingly, we think it fair to conclude based on the plain meaning of the text that the privacy of the stored communications is the object of the statute's solicitude, and the focus of its provisions.[438]

iii. Similarly, *Berkos*'s crabbed conception of the SCA also clashes with intervening Supreme Court decisions recognizing heightened – not reduced – privacy expectations in digital data and affording it greater – not less – protection.[439]

c. The distinction *Berkos* drew and the district court adopted – whereby the SCA incorporates Rule 41's procedural but not substantive provisions, the latter purportedly including Rule 41(b)'s territorial limits – is artificial, elusive and impracticable.

---

[438] *Ibid.* at 217 (citation, internal quotation marks and alteration omitted).

[439] *See Carpenter v. U.S.*, 138 S. Ct. 2206 (2018); *Riley v. Ca.*, 573 U.S. 373, 393-97 (2014) (noting that "a cell phone search" reveals "far *more* than the most exhaustive search of a house," yielding a "digital record" summarizing "nearly every aspect" of "an individual's private life" – especially where phone "display[s] data" stored remotely "in the cloud"); *Jones v. U.S.*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."); *U.S. v. Smith*, 967 F.3d 198, 207-08, 212-13 (CA2 2020).

i. "Except at the extremes," as Justice Scalia pithily put it, "the terms 'substance' and 'procedure' describe very little except a dichotomy."[440] "[I]n many situations, procedure and substance are so interwoven that rational separation becomes well-nigh impossible."[441] "Procedure at once reflects and creates substantive rights, and *every effort of courts since the beginnings of the common law to separate the two has proven essentially futile*. The distinction between them is particularly inadequate … where the legislature's substantive preferences directly and unavoidably require judgments about procedural issues."[442]

ii. At any rate, even assuming the distinction's viability, Rule 41(b) – to the extent Judge Cogan correctly characterized it as a "venue" provision[443] – falls squarely on the procedural side of the

---

[440] *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988); *see also Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 317 n.3 (1994) (Blackmun, J., dissenting) (criticizing "substance/procedure dichotomy" as "mechanical").

[441] *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 559 (1949) (Rutledge, J., dissenting); *see also Jinks v. Richland Co., S.C.*, 538 U.S. 456, 465 (2003) (questioning "if the substance-procedure dichotomy posited by respondent is valid").

[442] *App. of Gault*, 387 U.S. 1, 70-71 (1967) (Harlan, J., concurring and dissenting) (emphasis supplied), *overruled on other grounds*, *Allen v. Il.*, 478 U.S. 364, 372-73 (1986).

[443] A: 339.

line.[444] Since the SCA thus incorporates it, a Manhattan federal warrant for a Washington digital search violates both regulations – even on *Berkos*'s and the district court's own faulty approach.

3. Good faith can't redeem the text messages from the Washington server. Jurisdictional authority – "territorial"[445] or otherwise – is no technicality. Instead, as then-Judge Gorsuch took pains to emphasize, a warrant granted by a court without legal power to issue it is "*void ab initio*," akin to "no warrant at all."[446] By definition, such an instrument is so "facially deficient that reliance upon it is unreasonable."[447]

---

[444] *See, e.g.*, *Amer. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994) ("venue is a matter that goes to process rather than substantive rights – determining which among various competent courts will decide the ca[u]se"); *Martinez v. Bloomberg LP*, 740 F.3d 211, 220 (CA2 2014) (venue questions "essentially procedural, rather than substantive, in nature") (citation and internal quotation marks omitted); *Magi XXI, Inc. v. Stato della Citta del Vaticano*, 714 F.3d 714, 721 (CA2 2013) (same) (citing *Jones v. Weibrecht*, 901 F.2d 17, 19 (CA2 1990)).

[445] *U.S. v. Krueger*, 809 F.3d 1109, 1123-24 (CA10 2015) (Gorsuch, J., concurring in judgment).

[446] *Ibid.*; *cf. Dahda v. U.S.*, 138 S. Ct. 1491, 1499 (2018) (warrant provision "without legal effect" where "[o]rders could not legally authorize a wiretap outside … [d]istrict [c]ourt's territorial jurisdiction").

[447] *U.S. v. Purcell*, 967 F.3d 159, 180 (CA2 2020) (citations and internal quotation marks omitted).

4. Suppression will encourage the government to scrupulously heed – and deter it from conveniently cutting corners to evade – this Court's admonition that digital searches pose "an especially potent [privacy] threat," giving agents and prosecutors a "vast trove of personal information" about the individual to whom the electronic data "belongs."[448]

***

Because damning text messages from the Texas website and Washington server were both unlawfully obtained and improperly admitted, Guzman's conviction must fall.

[448] *Ibid.* at 183 (citations and internal quotation marks omitted); *cf.* A: 340-41.

POINT VI

THE DISTRICT COURT ABUSED ITS DISCRETION BY A COMBINATION OF ERRONEOUS EVIDENTIARY RULINGS THAT STYMIED GUZMAN'S ABILITY TO CROSS-EXAMINE AND DEFEND, DENYING HIM A FAIR TRIAL AND REQUIRING A NEW ONE

A. STATEMENT

A patch of legal misconceptions led the district court to a raft of erroneous evidentiary rulings[449] that severely curtailed and collectively prejudiced Guzman's defense. First a few of the misconceptions. Then a handful of the imbalanced and incongruous rulings – lopsidedly favoring the government – that they helped inspire.

B. THE DISTRICT COURT MISCONSTRUED KEY TENETS OF EVIDENCE LAW

Riddling the district court's resolution of disputed evidentiary points – and draining the deference those determinations would otherwise deserve – were misapprehensions of several formative legal principles.[450] Among the notable illustrations:

---

[449] Too many of these rulings rested materially on secret government submissions that Guzman couldn't see or contest – reason enough to reverse. *See* **POINT II**.

[450] *E.g.*, *U.S. v. Birkedahl*, No. 19-2304, __ F.3d __, 2020 WL 4963244, at *3 (CA2 Aug. 25, 2020) (error of law equals abuse of discretion) (citation omitted); *U.S. v. Estevez*,

1. In precluding inquiry and evidence that the defense proposed and proffered, the court continually cited prejudice to the government as an important benchmark.[451] In fact, this Court has long instructed that "the normal risk of prejudice is absent" where, as here, the accused offers evidence "to prove a fact pertinent to the defense."[452] "In such cases the *only* issue" is "whether the evidence is relevant."[453]

2. Even as it overweighted government prejudice, the district court jacked up the "liberal"[454] and "lenient"[455] probity standard attending proffered defense evidence – a devastating double whammy.[456] Over 35 years ago, though, this Court made clear that the "admissibility" criteria "when a criminal defendant offers [other] acts evidence as a

---

961 F.3d 519, 529 (CA2 2020) (same) (citations omitted); *Dupree*, 706 F.3d at 135 (same).

[451] *See*, *e.g.*, A: 422-23 n.1, 424-25, 431-33, 437, 469, 491, 496.

[452] *U.S. v. Cohen*, 888 F.2d 770, 777 (CA11 1989) (citing *U.S. v. Aboumoussallem*, 726 F.2d 906, 911-12 (CA2 1984)).

[453] *Aboumoussallem*, 726 F.2d at 912 (emphasis supplied) (footnote omitted).

[454] *Ibid*.

[455] *Perry v. Watts*, 520 F. Supp. 550, 557 (N.D. Cal. 1981), *aff'd*, 713 F.2d 1447 (CA9 1983).

[456] *See*, *e.g.*, A: 423-24, 436-37, 462; T. 5372-77, 5389-91.

shield need not be as restrictive as when a prosecutor uses [it] as a sword."[457] "The trial court's discretion [thus] does not extend" to banning "crucial relevant evidence" offered defensively.[458] Rather, such so-called "reverse 404(b)" proof should usually come in if it has *any* rational tendency to negate guilt or generate reasonable doubt.[459] Significantly, this "relaxed"[460] approach accommodates even evidence that might be excluded – as, for example, "remote," "irrelevant" or "speculative" – if offered by the prosecution.[461]

3. The district court admitted various items of government evidence as "inextricably intertwined with," and "complet[ing the] story of," the "charged crimes," explicitly instructing the jury to that effect.[462] But "other circuits have criticized or done away with similar 'completes

---

[457] *Ante* n.453 at 911; *accord Scrimo v. Lee*, 935 F.3d 103, 121-22 (CA2 2019) (Newman, J., concurring).

[458] *Cohen*, 888 F.2d at 776.

[459] *U.S. v. Stevens*, 935 F.2d 1380, 1383, 1401-06 (3d Cir. 1991) (Becker, J.).

[460] *Ante* n.458.

[461] *Johnson v. U.S.*, 552 A.2d 513, 517 (D.C. 1989); *accord Morales v. Portuondo*, 154 F. Supp. 2d 706, 725 (S.D.N.Y. 2001) (right to present defense may "require the admission of evidence that would ordinarily be inadmissible") (citation and internal quotation marks omitted).

[462] *See*, *e.g.*, A: 351-52, 393-94, 396-97, 456, 459, 514.

the story' or 'inextricably intertwined' theories of intrinsic evidence,"[463] rejecting them as thin "disguise[s]" for "propensity" proof.[464]

4. Finally, the district court universally failed to appreciate[465] an empirical and doctrinal truth that **POINT VIII** elaborates more fully: a "common" and legitimate "trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant."[466]

C. A COMPLEX OF FLAWED EVIDENTIARY RULINGS HOBBLED GUZMAN'S DEFENSE AND DENIED HIM A FAIR TRIAL

As mentioned, the preceding mistakes of law and a batch of others keyed a swirl of erroneous evidentiary rulings that command no

[463] *U.S. v. Brizuela*, 962 F.3d 784, 794 n.8 (CA4 2020) (citing *U.S. v. Bowie*, 232 F.3d 923, 929 (D.C. Cir. 2000); *U.S. v. Gorman*, 613 F.3d 711, 719 (CA7 2010); *U.S. v. Green*, 617 F.3d 233, 248 (CA3 2010)); *see also U.S. v. Fuertes*, 805 F.3d 485, 494 n.4 (CA4 2015); *U.S. v. Irving,* 665 F.3d 1184, 1215 (CA10 2011) (Hartz, J., concurring).

[464] *Gorman*, 613 F.3d at 718.

[465] *See*, *e.g.*, T. 4756-58, 4768-72, 5369.

[466] *Kyles v. Whitley*, 514 U.S. 419, 446 (1995) (citation and internal quotation marks omitted).

deference[467] and cumulatively[468] inhibited Guzman's rights to cross-examine and defend. Here are some choice selections.

1. Withheld Role Evidence

In letting the government hold back evidence suggesting that Guzman was "working for" or "under other drug traffickers" with whom he was "at odds," the district court insisted that being "less involved than" or "rivals with" other "drug trafficker[s] d[id] nothing to exculpate [Guzman]."[469] We disagree. The withheld evidence bore directly on whether Guzman was a "principal administrator, organizer, or leader of the enterprise"[470] – the same rationale on which the court admitted squalls of *government* evidence showing his reputed role in the Sinaloa Cartel.[471]

The double standard defies explanation. And it's even odder in that Guzman's purported position as a "principal administrator, organizer, or

---

[467] *See ante* n.450.

[468] *See*, *e.g.*, *DePetris v. Kuykendall*, 239 F.3d 1057, 1062-63 (CA9 2001) (materiality of excluded defense evidence evaluated cumulatively, not item-by-item).

[469] A: 215-17.

[470] 21 U.S.C. § 848(b)(1).

[471] *See*, *e.g.*, A: 394-99, 405-06, 458.

leader" was an essential element of an aggravated CCE offense, to be put and proved to the jury beyond a reasonable doubt. Indeed, the court itself elsewhere acknowledged as much[472] and instructed the jury accordingly.[473] By contrast, "principal administrator, organizer, or leader" status was scarcely the mere "sentencing" factor that the court demoted it to in keeping the evidence back.[474]

In demanding it both ways – declaring "any evidence … disput[ing Guzman's] alleged preeminence as a drug trafficker" categorically non-"exculpatory"[475] – the district court palpably usurped the jury's factfinding role. But because the accused is constitutionally entitled to present his defense theory to the jury,[476] it's elementary that the court should not "pass on the strength or merits" of putative exculpatory

[472] *See*, *e.g.*, A: 345-46.

[473] A: 554, 569.

[474] A: 216.

[475] *Ibid.*

[476] *E.g.*, *U.S. v. Thompson*, 25 F.3d 1558, 1564 (CA11 1994).

evidence.[477] Questions of plausibility go only to evidentiary weight[478] and are for the jury alone to determine.[479]

[redacted] Those objections only beg the question.

As **POINT II** reflects, a great body of medical and judicial literature – including opinions from at least three current and former Supreme Court justices – documents that even short stays in solitary confinement can have devastating long-term if not permanent psychological

[477] *Crane v. Kentucky*, 476 U.S. 683, 691 (1986).

[478] *Justice v. Hoke*, 90 F.3d 43, 49 (CA2 1996).

[479] *E.g.*, *Thompson*, 25 F.3d at 1565 (assessing credibility is function of jury, not district court).

[480] A: 437, 471-72, 474-76.

repercussions.[481] With that abundant foundation – scientific, sociological and penological – in place, it was for the jury, not the court, to determine whether [redacted] hallucinations impacted [redacted] perception, memory and ability to distinguish fantasy from reality.[482]

Put differently, [redacted] testimony on this score would have *supplied* the evidence – or not – that the district court complained was missing. How else, short of cross-examination at trial, could Guzman hope to elicit evidence from a government cooperator subject to a draconian protective order? To quote another Brooklyn federal judge in a similar context, while nothing in the "record before the court" indicated

> that the witness's medical treatment in 2009 had any effect on the witness's ability to perceive or to recall events or to testify accurately about the events at issue, *without any documentation establishing that there was no such effect*, the defendants are entitled to cross-examine the witness regarding the medication and its effects, if any, on her perception and recollection. *See* [*U.S. v.*] *Butt*, 955 F.2d [77,] 82 [(CA1 1992)] ("The readily apparent principle is that the jury should,

[481] *See, e.g.*, *Apodaca*, 139 S. Ct. at 6 n.1; *Ruiz*, 137 S. Ct. at 1247; *Davis*, 576 U.S. at 587-88 (Kennedy, J., concurring); *J.H.*, 951 F.3d at 719; *Williams*, 848 F.3d at 566-67; *Basciano I*, 369 F. Supp. 2d at 352-53.

[482] *See ante* 129-30 & nn. 477-79 and sources cited.

> within reason, be informed of all matters affecting a witness's credibility ...." (citations omitted)).[483]

[redacted]

In sum, "[a]lthough disclosure" of the voices he heard may have "embarrass[ed]" [redacted] Guzman's "opportunity to cross-examine" on the witness's "psychological condition" was "important to assessing[redacted]

---

[483] *U.S. v. Dupree*, 833 F. Supp. 2d 255, 264-65 (E.D.N.Y. 2011) (additional citation and internal quotation marks omitted), *vacated on other grounds*, 706 F.3d 131.

[484] *See* A: 471-73, 475-76.

[485] *Cf. Dupree*, 833 F. Supp. 2d at 264 (use of anti-anxiety medication "within the time period at issue in this case" was probative of "ability to perceive and recall" events "about which" witness would "testify"; defendant therefore entitled to cross-examine on point).

credibility."[486] And the defense deserved "wide latitude" and a "heightened" chance to explore that area.[487]

3. Chapo Myth Testimony

The district court barred Homeland Security agent John Zappone, who "[s]pent almost a year listening to [Guzman] and his group," from opining that "Chapo was more myth than actual legend," calling the proffer unnoticed expert testimony based on specialized knowledge drawn from the totality of the agent's investigative experience.[488] Not so.

By its plain terms, Zappone's proposed testimony, proffered as lay opinion, stemmed from his own personal perceptions formed in

---

[486] *U.S. v. Paredes*, No. 99-cr-290, 2001 WL 1478810, at *2 (S.D.N.Y. Nov. 20, 2001); *cf. Davis v. Ak.*, 415 U.S. 308, 319 (1974) ("[w]hatever temporary embarrassment might result to" witness prosecution insisted on using to make its case is "outweighed" by "right to probe into the influence of possible bias"); *compare* A: 437 (citing "stigma associated with" aural hallucinations in barring cross) and A: 476 (same).

[487] *Paredes*, 2001 WL 1478810, at *2 (citing *U.S. v. Kohan*, 806 F.2d 18, 23 (CA2 1986) and *U.S. v. Kyles*, 40 F.3d 519, 526 (CA2 1994)). *See*, *e.g.*, *U.S. v. Peters*, 236 F. App'x 217, 220-22 (CA7 2007) (defendant permitted to cross-examine on witness's hearing "'voices'" and experiencing "'hallucinations'"); *U.S. v. Partin*, 493 F.2d 750, 764 (CA5 1974) (trial court erred in precluding records of witness "reporting auditory hallucinations"); *Parker v. Ercole*, 582 F. Supp. 2d 273, 304-05 (N.D.N.Y. 2008) (defendant permitted to cross-examine victim-witness on "hear[ing] voices").

[488] A: 480-81, 483-84 (internal quotation marks omitted).

investigating *Guzman* – as distinct from crime generally. And the law, as spelled out by then-Judge Kavanaugh, is clear:

> "An [agent] testifying about the operations of a drug conspiracy because of knowledge of that drug conspiracy ... should be admitted as a lay witness; an [agent] testifying about the operations of a drug conspiracy based on previous experiences with other drug conspiracies ... should be admitted as an expert." [*U.S. v.*] *Wilson,* 605 F.3d [985,] 1026 [(CADC 2010)]. We have drawn that line because knowledge derived from previous professional experience falls squarely "within the scope of Rule 702" [the rule governing expert testimony] and thus by definition outside of Rule 701 [the rule governing lay opinion]. *See* Fed. R. Evid. 701(c). Other courts of appeals have reached the same conclusion. *See U.S. v. Oriedo,* 498 F.3d 593, 602-03 (CA7 2007); *U.S. v. Garcia,* 413 F.3d 201, 216-17 (CA2 2005).[489]

Because Zappone's opinion – that Chapo was a myth – came from a year of personally listening to the latter in the investigation at hand, it was "rationally based on" Zappone's own "perception" – not on "specialized knowledge" gained "in the course of [all his] investigations."[490] It follows that the opinion – powerfully exculpatory

[489] *U.S. v. Smith*, 640 F.3d 358, 365 (CADC 2011) (footnote omitted).

[490] A: 483 (citations and internal quotation marks omitted).

evidence from a government agent and prosecution witness testifying on firsthand knowledge – was admissible under Rule 701.[491] Conversely, excluding the opinion under an errant view of the law was hugely damaging since Guzman had opened on it.[492]

4. Alex Cifuentes's Strange Preoccupations

Alex Cifuentes, a central government cooperating witness, described himself as Guzman's "secretary," "right-hand" and "left-hand man."[493] Cifuentes also had a bizarre set of predilections and preoccupations.[494]

For example, a TV show about a "15-foot-tall alien race from another universe that used to mine the Earth's metals" had "'made a big

---

[491] *See*, *e.g.*, *Smith*, 640 F.3d at 367 (agent properly opined that alleged coconspirators were "working together putting their money together and going to New York to buy heroin" based on "statements" by the coconspirators that agent "himself heard when listening to thousands of intercepted conversations") (internal quotation marks omitted); *U.S. v. Santiago*, 560 F.3d 62, 66-67 (CA1 2009) (agent properly interpreted drug code as lay witness having "been involved in the investigation, listened to over 90 percent of the intercepts, learned voices and patterns, and heard and used the coded language in his undercover drug buys relating to the investigation").

[492] T. 579, 602.

[493] 1/10/19 Tr. 5.

[494] A: 463.

impression'" on Cifuentes.[495] He "belie[ved]" in an "impending apocalypse due to the inevitable collision of the Earth with planet 'Nibiru' and planet 'Oficuco.'"[496] And he told the government that he "'doesn't know to what point this'" – meaning unclear – "'is reality.'"[497]

The government sent a *Giglio*[498] letter describing Cifuentes as a "paranoid" "hypochondriac" who "believ[ed] in conspiracy theories" and was "confident that the Pentagon and the CIA were aware of the impending apocalypse and … making appropriate preparations."[499] Cifuentes' "former family wealth and power," the letter continued, "possibly influenced" his "perception of reality at times," giving him "delusions of grandeur."[500] He consulted and visited "witch doctors."[501] And "[s]ome" of these predilections and preoccupations obtained "during

---

[495] *Ibid.*

[496] *Ibid.* (additional quotation marks omitted).

[497] A: 463, 465-66.

[498] *Giglio v. U.S.*, 405 U.S. 150 (1972).

[499] A: 463-64 (internal quotation marks omitted).

[500] A: 464.

[501] A: 463-64, 469-70.

the period charged in the indictment, including at the time of events to which" Cifuentes "testif[ied] at trial."[502]

Guzman sought to cross-examine Cifuentes on the predilections and preoccupations under Fed. R. Evid. 608(b), arguing that they bore on his credibility and capacity for truthfulness – specifically, on his reliability and state of mind.[503] The district court refused, finding no "evidence or indication from a medical professional" that Cifuentes had a "deep or sustained psychological problem" – an "impairment" so severe that it "fundamentally altered" his "ability to function or participate in everyday life."[504]

There is no such onerous requirement. A defendant need not prove that a witness has been formally diagnosed with – or treated for – debilitating "mental instability," psychological defect or cognitive ailment[505] to "expose" the jury to "facts" bearing on the witness's

---

[502] A: 464.

[503] *E.g.*, *Davis*, 415 U.S. at 318 (defense counsel entitled to "expose to the jury … facts from which jurors, as the sole triers of fact and credibility, [may] appropriately draw inferences relating to [witness] reliability").

[504] *See* A: 465-66 & n.4.

[505] A: 464-68, 470, 423-24.

"credibility" and "reliability."[506] Rather, he need only show, subject to Rule 403 considerations, that the "fact[]" at issue – the proffered evidence or proposed line of inquiry – "has any tendency to make a fact" of "consequence" "more or less probable."[507] Here, Cifuentes's fantastic predilections and preoccupations plainly impacted the consequential fact of his trustworthiness and veracity.

As the district court professed to recognize, it was the jury's function – not its own – to "assess" the coherence and validity of Cifuentes's far-out "beliefs."[508] And in evaluating witness credibility, the court instructed the jury to use "common sense" and "good judgment" – not professional diagnostic criteria – to "size up a person just as you would in any important matter when you're trying to decide if a person is truthful, straightforward, and accurate in their recollection."[509]

---

[506] *Ante* n.503.

[507] Fed. R. Evid. 401.

[508] *See* A: 423, 468-69.

[509] A: 415-16, 418.

As a matter of common sense and good judgment, the "sheer implausibility"[510] of Cifuentes's beliefs – entailing paranoid conspiracy theories, delusions of grandeur, a shaky grasp on reality and an apocalyptic collision involving fictitious planets, the Pentagon and CIA – counseled great skepticism and close scrutiny of his testimony. To put it in lay (not clinical) terms, ordinary jurors exposed to those beliefs might well conclude that Cifuentes was a flake, crackpot or nutbag, difficult or impossible to take seriously – just as if they met him in real life.[511] And given the government's own expressed reservations as to Cifuentes's perception and mental condition, ordinary jurors might equally wonder about the "caliber of [its] investigation [and] the decision to charge the defendant"[512] – wonder about prosecutorial and law enforcement bias against Guzman – in embracing a witness with Cifuentes's baggage.

---

[510] A: 466.

[511] *See* A: 468 (court itself admitting that Cifuentes's beliefs flew in the face of what "many … people[] believe to be right and true").

[512] *Ante* n.466.

The district court drew its "deep or sustained psychological problem" requirement[513] from *U.S. v. Vitale*.[514] That case is inapposite. *Vitale* "affirmed a district court's denial of [defense] *access* to a government witness's drug *records*."[515] By contrast, "'the district court *permitted* defense counsel wide latitude [to] cross-examin[e] [the witness] about his drug use and rehabilitation, including questions about the effects that the drugs had on his ability to perceive events when they occurred as well as on his memory at the time of trial'"[516] – exactly what was *precluded* here.

Whatever label one attaches to the information proffered – whether evidence of "unorthodox beliefs" or "psychological symptoms"[517] – it inescapably bore on Cifuentes's state of mind and reliability as a witness. Accordingly, the district court erred as a matter of law in subjecting the

---

[513] A: 465 & n.4.

[514] 459 F.3d 190 (CA2 2006).

[515] *Dupree*, 833 F. Supp. 2d at 265 (emphasis supplied).

[516] *Ibid.* (emphasis supplied) (quoting *Vitale*, 459 F.3d at 196).

[517] A: 465 (footnote omitted).

information to an elevated admissibility standard and barring cross-examination for failure to meet it.[518]

5. Alex Cifuentes Prison Drugging Episode

The district court also barred cross-examination on Cifuentes's drugging fellow Colombia prison inmates to keep them calm in the yard, somehow contending that secretly slipping narcotics in their coffee wasn't "an act of deception."[519] Without belaboring the point, that assertion confounds common sense and subverts the presumption of "wide"[520] cross-examination leeway and "heightened"[521] ability to "inform" the jury of "all matters affecting" witness "credibility."[522] Since Cifuentes hoped that maintaining yard discipline would earn American cooperation

[518] *See ante* 126-27 & nn.454-61 and sources cited.

[519] T. 5372-77, 5389-91.

[520] *Paredes*, 2001 WL 1478810, at *2 (citation omitted).

[521] *Ibid.*

[522] *Ante* 132-33 & n.483; *see also id.* n.503.

credit,[523] this incident also bore on his bias and motive,[524] suggesting he'd say and do almost anything he thought could curry government favor.

To the extent the court surmised that Cifuentes may have been joking about the cooperation credit,[525] that was obviously a jury question. And where the defendant's "sixth amendment right[s]" are "implicated," the government must offer a "compelling" Rule 403 justification to exclude exculpatory evidence.[526] Any "confusion" attending such evidence therefore must be "overwhelming to satisfy Rule 403's balancing test."[527]

The government introduced and interpreted many harmful recordings through Cifuentes, and the jury requested and received a readback of his testimony.[528] So ousting the weird predilections and preoccupations and blocking the prison drugging episode unfairly

---

[523] *See ibid.* n.519.

[524] *See Del. v. Van Arsdall*, 475 U.S. 673 (1986); *U.S. v. Abel*, 469 U.S. 45 (1984); *Davis*, 415 U.S. 308.

[525] *Ante* n.519.

[526] *Pettijohn v. Hall*, 599 F.2d 476, 481 (CA1 1979).

[527] *U.S. v. Blum*, 62 F.3d 63, 68 (CA2 1995) (citation and internal quotation marks omitted).

[528] T. 7066, 7071.

restricted cross-examination of an important government witness, Guzman's self-described "secretary," "right-hand" and "left-hand man."[529]

D. CONCLUSION

The erroneous evidentiary rulings assailed in this **POINT** collectively impeded Guzman's right to cross-examine and prejudiced his ability to defend,[530] denying him a fair trial and demanding reversal for a new one.

POINT VII

GUZMAN'S CONVICTION MUST BE REVERSED, OR THE CASE REMANDED FOR FACTUAL INQUIRY, BECAUSE HIS LEAD LAWYER SUFFERED FROM A *PER SE* CONFLICT OF INTEREST

In the midst of trial, published reports emerged linking Guzman's married lead lawyer – who delivered opening and closing arguments and cross-examined several key witnesses[531] – to another prominent client romantically.[532] The reports quoted a putative text message from the

[529] *Ante* n.493.

[530] *Ibid.* 128-29 & n.468.

[531] *Cf. Triana*, 205 F.3d at 43.

[532] *E.g.*, Dana Schuster, Sarma Melngailis had a steamy affair with her married lawyer, NY POST, Jan. 12, 2019, https://nypost.com/2019/01/12/sarma-melngailis-had-an-x-rated-relationship-with-her-married-lawyer/ (as visited 8/16/20).

lawyer saying he was facilitating illicit pretrial visitation with Guzman, prohibited by the SAMs, at the MCC.[533] Another quoted message suggested the lawyer may have negotiated questionable settlements in sexual harassment cases involving consensual sex.[534]

Though actually aware of the reports, the district court did nothing to explore either of these issues – with Guzman, the lead lawyer or anyone else.[535] Nor did either party ask it to do so.[536]

Purportedly facilitating proscribed jail visits implicated lead counsel in criminal activity – violating the SAMs, falsely swearing to obey them and obstructing justice[537] – "sufficiently related" to that of his client to create a *per se* conflict of interest requiring automatic reversal of Guzman's conviction, without a showing of prejudice or adverse effect on

---

[533] *Ibid.*

[534] *Ibid.*

[535] T. 5009-16; *cf. Mickens*, 535 U.S. at 168-69 (judicial inquiry obligatory when "trial court knows or should know that a particular conflict exists") (citation, internal quotation marks and footnote omitted).

[536] *Ibid.*; *cf. Wood v. Ga.*, 450 U.S. 261, 265 n.5 (1981) (conflicted lawyer "unlikely" to "concede that he had continued to act improperly as counsel"); *Massaro v. U.S.*, 538 U.S. 500, 502-03 (2003) ("an attorney who handles both trial and appeal is unlikely to raise an ineffective-assistance claim against himself").

[537] *See U.S. v. Stewart*, 590 F.3d 93 (CA2 2009).

the defense.[538] A lawyer implicated in crimes with his client necessarily has "reason to fear that vigorous advocacy" on the client's "behalf" will "expose him to criminal liability or … other sanction,"[539] presumptively "affect[ing] virtually every aspect" of the "representation."[540] At a minimum, this Court must remand for the mandatory conflict inquiry eschewed below, with automatic reversal to follow if the facts confirm the forbidden jail visits.[541]

POINT VIII

THE DISTRICT COURT WRONGLY PRECLUDED GUZMAN'S GOVERNMENT BIAS DEFENSE, VIOLATING THE FIFTH AND SIXTH AMENDMENTS

Throughout his summation, defense counsel tried to argue that the government was so eager to convict a mythic figure like Guzman – law enforcement's holy grail and white whale, the ultimate trophy defendant – that it was willing to sponsor and condone obvious perjury by its parade

---

[538] *Triana*, 205 F.3d at 42-43 (citation and internal quotation marks omitted); *see, e.g.*, *Elfgeeh v. U.S.*, 681 F.3d 89, 92-93 (CA2 2012) (collecting cases).

[539] *Waterhouse v. Rodriguez*, 848 F.2d 375, 383 (CA2 1988).

[540] *U.S. v. Fulton*, 5 F.3d 605, 613 (CA2 1993).

[541] *Cf. Mickens*, 535 U.S. 162 (requiring adverse effect where court fails to investigate *potential* – not *per se* – attorney conflict).

of 14 cooperating witnesses.[542] Indulging and overlooking demonstrable lies,[543] counsel suggested, betrayed indelible investigatory and prosecutorial bias against Guzman, citing specific instances of assertedly false testimony as support.[544] In turn, investigatory and prosecutorial

---

[542] *E.g.*, T. 6718-25, 6780, 6794, 6884-88.

[543] *E.g.*, T. 6820 ("[T]hey're [prosecutors] never going to get up in front [of] you and tell you that their witnesses are lying under oath during this trial."); *id.* 6867-68 ("What do you think would happen to a regular person like us if we dealt drugs? You think you would get no jail, get to keep all your assets? Do you think you would get the red carpet rolled out for you? You know what would happen. You would go right into a cell and be forgotten…. If you have Chapo Guzman to cooperate against, you can get benefits."); *id.* 6875 ("Sometimes you can lie so much that even the [g]overnment …").

[544] *E.g.*, T. 6819-20 ("He [cooperating witness] Vicente Zambada actually testified with a straight fac[e] that [he] didn't know if his father [codefendant and accused Sinaloa Cartel boss Mayo Zambada, at large in Mexico] had surrendered. He's trying to act as if he doesn't know what's going on because he's got blinders on. Of course he knows that his father didn't surrender. The guy's had access to the news, he … talks to his mother. Of course, he would have known if Mayo had surrendered. He lied to you because lies are cheap here, they don't cost nothing."); *id.* 6843 ("[H]e [cooperating witness Miguel Martinez Martinez] uses lawyers to bribe judges and suddenly he needs one to tell him not to lie to federal agents in America? You need a lawyer to tell you that? I mean, I would like to think that's something common sense that you are born with, that you don't lie to American federal agents. This is evidence of a guy who hasn't had an honest day in his life and he needs to be told not to lie…. He is here to get Chapo. That's what he's here for."); *id.* 6867 ("He [cooperating witness German Rosero] also said he had a house in Cali, Colombia worth 200,000; a house in Mexico worth 400,000; another house in Colombia worth 180; the house in Puerto Vallarta worth 483,000. The [g]overnment didn't seek any of it. It's a show to pretend that Rosero was doing the right thing; that they are doing the right thing – the [g]overnment. It's a show … to fool you to make it appear as if these people have things hanging over their heads and they are being punished gravely for their actions."); *id.* 6875 ("Suddenly, [cooperating witness Edgar] Galv[a]n says that Marrufo [a reputed narcotrafficker] paid [Guzman] $3 million per month to have total

bias hopelessly tainted the integrity and reliability of the case the government had assembled, rendering it wholly unworthy of belief.[545] Garbage in, garbage out, as it were.

The district court, however, sustained dogged objections to this line of argument,[546] dubbing it "[in]valid,"[547] directing counsel to desist[548] and affirmatively telling the jury "[t]here's no evidence in this case that the [g]overnment is operating under any kind of improper motive."[549] Echoing the latter edict, the court's final charge repeated – at government request[550] and over defense objection[551] – that "the [g]overnment is not on trial, and I instruct you to *disregard any arguments that may have been made to the contrary*. ***There is no***

---

control of Juarez in Mexico. That wasn't even elicited on direct because I presume it was such ridiculous numbers that even the [g]overnment thought it was crazy.").

[545] *Ante* n.542.

[546] T. 6820, 6843, 6868, 6875.

[547] T. 6868.

[548] T. 6821, 6868.

[549] T. 6820.

[550] ECF 567 (2/1/19).

[551] ECF 570 (2/2/19).

evidence that the [g]overnment operated under any kind of improper motive."[552]

Those decrees were dead wrong, both legally and factually. On the legal front, recall that the Constitution "guarantees criminal defendants a meaningful opportunity to present a complete defense."[553] And as the Supreme Court has squarely recognized, a "common" and legitimate "trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant."[554]

Tossing a capital murder conviction for *Brady* violations, *Kyles* found materiality in withheld statements that would have impugned the investigation's "thoroughness" and "good faith," revealing a "remarkably uncritical attitude on the part of the police."[555] Specifically, the statements would have undermined the investigation's "reliability" in "tolerating (if not countenancing) serious possibilities that incriminating

---

[552] A: 511 (emphasis supplied).

[553] *Holmes*, 547 U.S. at 324 (citations and internal quotation marks omitted).

[554] *Kyles*, 514 U.S. at 446 (citation and internal quotation marks omitted).

[555] *Ibid.* at 441-42, 445.

evidence had been planted."[556] When "the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud," the high court explained, investigative "sloppiness" tends to discredit the "police methods employed" in gathering the evidence, "diminish[ing]" its "probative force."[557]

Swap the word "fabricated" for *Kyles*'s "planted" and what do you get? The very argument Guzman pressed and the Supreme Court endorsed but the district court inexplicably precluded: namely, that the government's "remarkably uncritical attitude" in "tolerating" what counsel framed as blatant cooperator perjury undermined the prosecution's "good faith" and "reliability," impugning "the decision to charge the defendant."[558]

Adding insult to legal injury, the instructions the district court gave also misstated the facts. For contrary to their supposition, there *was*

---

[556] *Ibid.* at 446.

[557] *Ibid.* & n.15 (citations and internal quotation marks omitted).

[558] *See ante* nn. 555-56.

circumstantial "evidence"[559] – the putative lies counsel specifically identified[560] and the prosecution left uncorrected – that the government *did* "operate[]" under an "improper motive."[561] And as the court itself elsewhere instructed, "[t]he law doesn't say that one is better than the other. It doesn't make any distinction between direct and circumstantial evidence, and you may give either or both whatever weight you conclude is warranted."[562] At the very least, the challenged instructions were entirely unnecessary, the court having repeatedly charged the jury that arguments of counsel aren't evidence.[563]

With "cooperating witness testimony" forming a "significant portion" of the prosecution's "case" – the district court's own words[564] – "precluding" Guzman from arguing government bias to "raise the specter of reasonable doubt" neutered his defense and "violate[d] his right to a

---

[559] *Ibid.* nn. 549, 552.

[560] *Ibid.* n.544; *see* A: 522 (court instructing jury that "if you find that a witness testified falsely in one part, … you may disregard it all").

[561] *Ante* nn. 549, 552.

[562] A: 508; *see also* T. 548 (similar).

[563] *Ibid.*, *e.g.*, 548, 552, 612; A: 507, 512.

[564] A: 447; *accord* ECF 275 at 8-9.

fair trial," a harmful error compelling reversal.[565] To quote Judge Weinstein, "destroying the bona fides of the police is a tactic that has never lost its place in the criminal reasonable doubt armamentarium."[566]

[565] *Destin v. Govt. of V.I.*, No. 17-mc-17, 2017 WL 3475702, at *4 & n.29 (V.I. Super. Aug. 9, 2017) (citations and internal quotation marks omitted).

[566] *Orena v. U.S.*, 956 F. Supp. 1071, 1100 (E.D.N.Y. 1997); *see also State v. Wright*, 322 Conn. 270, 282, 140 A.3d 939, 945-46 (Conn. 2016) ("recogniz[ing] that defendants may use evidence regarding the inadequacy of the investigation into the crime with which they are charged as a legitimate defense strategy") (citation omitted).

POINT IX

THE DISTRICT COURT REVERSIBLY ERRED BY REFUSING TO INVESTIGATE A PUBLISHED POST-VERDICT REPORT IMPLICATING JURORS IN PERVASIVE MISCONDUCT THAT DEFIED THEIR OATH AND INSTRUCTIONS AND RENDERED THEM UNFIT TO SERVE: NAMELY, ACTIVELY SEEKING OUT PREJUDICIAL EXTRINSIC INFORMATION – INCLUDING INADMISSIBLE ALLEGATIONS THAT GUZMAN DRUGGED AND RAPED UNDERAGE GIRLS – AND SECRETLY COLLUDING TO COVER IT UP

A. ISSUE PRESENTED

In a case generating publicity the district court called "extraordinary,"[567] "unprecedented,"[568] "remarkabl[e]"[569] and "unparalleled,"[570] a juror contacted a reporter a day after the verdict to volunteer that panel members had violated their oath and scorned the court's incessant instructions by actively following and discussing the blizzard of media coverage, and falsely denying it upon judicial inquiry, throughout the three-month trial.

---

[567] A: 412, 449.

[568] A: 412.

[569] *Ibid.*

[570] T. 5011.

In the circumstances presented, did the jury's exposure to a flood of presumptively prejudicial extraneous information – including inadmissible allegations that the defendant drugged and raped 13-year-old girls – mandate an evidentiary hearing to determine (1) the misconduct's precise nature and scope; (2) the information's probable objective effect on a hypothetical average jury; (3) whether the jurors' reported lies to the court upon inquiry dictated disqualification or mistrial; and (4) whether the whistleblowing juror or any other intentionally withheld disabling bias during *voir dire*, collectively thwarting the defendant's Fifth and Sixth amendment rights to due process and fair trial before an impartial jury?

B. STATEMENT

The ultimate test of a justice system's fairness and integrity is how it performs under stress – in infamous cases involving heinous accusations and notorious defendants.[571] Chapo Guzman, like any other suspect hauled into an American court, was entitled to the fundamental "touchstone" of due process: an "impartial" jury "capable and willing to

[571] *See ante* n.58.

decide the case solely on the evidence before it."[572] Post-verdict media reports – presumptively accurate, credible and reliable – strongly suggest Guzman may not have gotten that bare essential.[573]

Reports of jury misconduct, of course, are nothing new in high-profile cases.[574] One factor that sets these apart is a juror's frank confession that panel members actively sought out and openly discussed the most sensational extrinsic information – including vile allegations that the defendant raped young girls[575] – overtly defying the court's

---

[572] *U.S. v. Greer*, 285 F.3d 158, 170 (CA2 2002) (citations and internal quotation marks omitted).

[573] *Cf. U.S. v. Jordan*, 958 F.3d 331, 337 (CA5 2020) (account given "shortly after … events in question" adds to "reliability") (internal quotation marks omitted); Fed. R. Evid. 803(b)(3)(A), 902(6).

[574] *E.g.*, *U.S. v. Stone*, No. 19-cr-0018, __ F. Supp. 3d __, 2020 WL 1892360 (D. D.C. Apr. 16, 2020) (reputed "fixer" for sitting U.S. president); *U.S. v. Lynne Stewart*, 590 F.3d 93, 133-34 (CA2 2009) (lawyer for spiritual leader of Islamic terror group); *U.S. v. Martha Stewart*, 433 F.3d at 302-08 (media mogul and TV personality); *U.S. v. Bin Laden*, No. 98-cr-1023, 2005 WL 287404 (S.D.N.Y. Feb. 7, 2005) (al Qaeda embassy bombers), *aff'd*, 552 F.3d 93 (CA2), *reh'g denied*, 553 F.3d 150 (CA2 2008); *U.S. v. Schwarz*, 283 F.3d 76, 97-100 (CA2 2002) (cops charged in Abner Louima assault); *U.S. v. Gigante*, 53 F. Supp. 2d 274 (E.D.N.Y. 1999) (mafia boss); *U.S. v. Ianniello*, 866 F.2d 540 (CA2 1989) (mafia bosses in 13-month megatrial), *rev'd on other grounds*, 937 F.2d 797 (CA2), *modified on reh'g*, 952 F.2d 623 (CA2), *amended*, 952 F.2d 624 (CA2 1991), *rev'd on other grounds*, 505 US 317 (1992), *on remand*, 974 F.2d 231 (CA2 1992), *vacated on other grounds*, 8 F.3d 909 (CA2 1993) (*en banc*); *U.S. v. Moon*, 718 F.2d 1210, 1233-36 (CA2 1983) (Unification Church founder).

[575] *E.g.*, *U.S. v. Tin Yat Chin*, 275 F. Supp. 2d 382, 385 (E.D.N.Y. 2003) ("[t]he most potentially prejudicial material … consists of specific facts about the specific defendant then on trial") (citation and internal quotation marks omitted).

perpetual injunctions and cannily lying to the judge when asked about it. Another distinguishing feature: a juror with no apparent agenda, ulterior motive or reason to fabricate voluntarily approached a journalist to divulge the misconduct, whereas jurors unhappy with verdicts typically reach out to the defense or are contacted by someone acting on its behalf.[576] If confirmed via evidentiary hearing, these exceptionally unusual reports and Criminal Rule 33 would demand a fair retrial – one affording Guzman the basic guarantees enshrined in the Fifth and Sixth amendments.[577]

C. BACKGROUND

Throughout Guzman's trial, the court continually admonished the anonymous jury to avoid the gavel-to-gavel publicity – unprecedented in

[576] *Cf.*, *e.g.*, *Lynne Stewart*, 590 F.3d at 133-34 ("post hoc" deliberation impropriety allegations caused by juror "dissatisfaction" with verdict "do not require further post-[trial] inquiry") (citation and internal quotation marks omitted); *Schwarz*, 283 F.3d at 88 (jurors contacted defense counsel after verdict to discuss aspects of deliberations); *U.S. v. Moten*, 582 F.2d 654, 665 (CA2 1978) ("some jurors, especially those who were unenthusiastic about the verdict or who have grievances against fellow jurors, [c]ould be led into imagining sinister happenings which … did not occur or … saying things which … would serve only to decrease public confidence in verdicts").

[577] *E.g.*, *Moten*, 582 F.2d at 664 (every "defendant has a right to a trial by an impartial jury, unprejudiced by extraneous influence").

its global scope and intensity – saturating the case.[578] Observing "better practice,"[579] the court persistently warned panelists to ignore the avalanche of media coverage – print, broadcast, digital and social – surrounding the ongoing litigation.[580]

A VICE News report by Keegan Hamilton, published eight days after the verdict, revealed that "at least five jurors" systematically "violated" their oath and flouted the court's instructions by "following the case in the media during the trial."[581] "[R]each[ing] out" by email a day after the "verdict came down," an unnamed juror apprised VICE in a two-hour video interview conducted a day later: "'You know how we were told

---

[578] *See ante* nn. 567-70; A: 413 ("This case has attracted observers, commentators, reporters, and readers from across the globe…. [T]he world is watching…"); T. 5011 (THE COURT: "The [press attention] has been unparalleled in my experience and I think most other judges.").

[579] *U.S. v. Ganias*, 755 F.3d 125, 132 n.4, 133 (CA2 2014) (cautioning that "the availability of the Internet and the abiding presence of social networking now dwarf the previously held concern that a juror may be exposed to a newspaper article or television program") (citation and internal quotation marks omitted), *rev'd on other grounds*, 824 F.3d 199 (CA2 2016) (*en banc*).

[580] *E.g.*, T. 5752 ("Ladies and gentlemen, we'll break for the day. Please stay away from any media coverage of the case, do not communicate or say anything to anybody about this case, don't do any research on the case. Keep your mind open.").

[581] Inside El Chapo's Jury: A Juror Speaks for the First Time about Convicting the Kingpin, Feb. 20, 2019, https://news.vice.com/en_us/article/vbwzny/inside-el-chapos-jury-a-juror-speaks-for-first-time-about-convicting-the-kingpin (as visited Mar. 18, 2019).

we can't look at the media during the trial? Well, we did. Jurors did.'"

Headlining the juror's bombshell disclosures:

> • Multiple panel members – including the interviewee and "'some other jurors that'" person "'knew'" – "routinely" if not "'constantly'" checked Hamilton's "personal Twitter feed and tweets from other journalists."[582] Twitter, naturally, was abuzz with "news, analysis, and observations from the courtroom" and elsewhere. As a hearing would verify, much of that content – especially the so-called "analysis" and "observations" – referenced inflammatory evidence the court had excluded and pronounced Guzman guilty before the proof had closed and the jury began to deliberate.[583]

---

[582] These attributions had the ring of truth. It seems unlikely that the juror would contact Hamilton within a day of the verdict's return unless the juror had been following Hamilton's trial coverage.

[583] By defense count at least seven different reporters regularly tweeted about the case. Jurors may have followed any or all of them, so they could have read tweets numbering well into the thousands over a three-month period. For a sample of representative tweets – the tip of the proverbial iceberg – *see*, *e.g.*, Emily Saul (@Emily_Saul_), Twitter (Feb. 2, 2019) ("#Chapo allegedly 'believed that sexual activity with young girls gave him "life,"' per disturbing new docs."); Noah Hurowitz (@NoahHurowitz), Twitter (Feb. 2, 2019) ("Here's my story for @RollingStone on the explosive allegations that El Chapo regularly drugged and raped underage sex workers, from docs unsealed today. The documents contain a ton of details and we'll be updating the story in a bit."); Keegan Hamilton (@keegan_hamilton), Twitter (Jan. 30, 2019) ("Chapo appears unperturbed…. Doesn't look like he realizes this is likely one of the last days he ever has outside of a federal prison."); *id.* (Jan. 29, 2019) ("What the jurors probably saw was the utter lack of a defense."); *id.* (Feb. 6, 2019) ("We're scrutinizing every tiny development, but there's still no real doubt about the outcome. One way or another, Chapo is getting life in prison."); Alan Feuer (@alanfeuer), Twitter (Feb. 6, 2019) ("[T]here's really only one way this trial is headed in the end. It's just a matter of how long it takes to get there."); Keegan Hamilton (@keegan_hamilton), Twitter (Feb. 6, 2019) ("Here are Chapo's other alleged murder conspiracy victims. Of these, maybe Miguel Martinez Martinez and Ramon Arellano

Felix could be construed as personal. The rest seem pretty clearly related to drug trafficking.").

For a sample of representative articles – again the proverbial iceberg's tip – *see*, *e.g.*, Steve Frank, El Chapo Lawyer Suggested Hiring Belly Dancer to Visit Accused in Jail (Jan. 14, 2019) ("'[E]ven if he's not convicted of the top count, even [if] he's not numero uno racketeer of the Sinaloa cartel, he's certainly up there enough to be convicted of everything else, in which case he's never getting out of prison'"), cbsnews.com/news/el-chapo-belly-dancer-text-defense-attorney-drug-trial (as visited Mar. 18, 2019); Leon Krauze, The End of El Chapo (Feb. 5, 2019) ("The trial also helped uncover allegations that Guzmán procured young girls he would drug and then rape. Guzmán would refer to the girls, some as young as 13, as his 'vitamins.' This is not a man who deserves a nickname or any other term of endearment…. He is … personally responsible for thousands of deaths … a ruthless criminal who helped poison millions … Joaquín Guzmán built a perverse empire through the suffering of others. He does not deserve a nickname. 'El Chapo' should be no more."), https://slate.com/news-and-politics/2019/02/el-chapo-trial-folk-hero-myth.html (as visited Mar. 18, 2019); Hollie McKay, Cruelty of El Chapo's Sinaloa Cartel Knows No Bounds: Beheadings by Chainsaw, Body Parts Strewn in the Streets (Dec. 8, 2018) ("the cartel's horrific tactics include the injection of adrenaline and other substances that affect the central nervous system of its victims, 'which kept them awake to enhance the responses of pain receptors during slow, prolonged torture.' These tactics are used on women and children … including 'family members of rivals or snitches, to elicit information and sow fear. These cartels have a history of sexually assaulting the family members of their target, and forcing the target to observe….' There's beheading by chainsaw – a rumored favored method of Guzmán, who is said to feature in a 2010 video doing exactly that to murder victim Hugo Hernandez. Even worse, Hernandez's face was reportedly peeled off after he was killed and stitched on a football. Then there is the practice of putting people in drums and either boiling them or setting them on fire or feeding humans to exotic animals like lions and tigers. One wealthy Tijuana native described … the day she came home from work … to find a package containing her husband's body, chopped up in pieces and sent back by cartel associates."), https://www.foxnews.com/world/cruelty-of-el-chapos-sinaloa-cartel-knows-no-bounds-beheadings-by-chainsaw-body-parts-strewn-in-the-streets (as visited Mar. 18, 2019); Alan Feuer, El Chapo Trial: How Many Gory Details Can One Jury Take? (Dec. 6, 2018) ("It remains unclear how many more assassinations will be mentioned at the trial – and just how explicit the details will be. The government has not yet offered the evidence it has about the murder of Francisco Aceves Urías, a Guzmán gunman known as Barbarino, who was slain three years ago in a restaurant parking lot in Mexico. Nor has the jury heard about the two rival traffickers whom Mr. Guzmán is accused of doing away with after relaxing over lunch. Prosecutors claim that once the men were dead, he had their bodies tossed into a pit and set on

- Though "[c]ell phones were confiscated" and the court directed jurors "not to discuss the case" – "'You can't talk about the case among each other'" ahead of deliberations – the jury reportedly "'broke that rule a bunch of times.'" Some conversations "happened on the ride home." Other times jurors would "whisper to each other or mouth words." Topics discussed included, significantly, "*the latest media coverage*." (Emphasis supplied.)

- Lacing the Twitter feeds that "several" jurors followed were updates on developments occurring in the jury's absence, including reports on evidence that the court "ordered withheld" from the panel's consideration. The most explosive allegation, publicly unveiled "on the eve" of "deliberations," was a claim that Guzman had "drugged and raped girls as young as 13." At least five deliberating jurors and two alternates knew and "'talk[ed] about'" the "child rape allegations," branding them "'disgusting'" and "'totally wrong.'"

- Worse, the juror read "before arriving at the courthouse" a Hamilton tweet reporting that the judge was "likely going to meet with the jurors in private and ask whether they had seen the story." Armed with that tip, the juror alerted the

---

fire."), https://www.nytimes.com/2018/12/06/nyregion/el-chapo-trial.html (as visited Mar. 18, 2019).

One line of coverage misconstrued Guzman's 30-minute defense case as an "extraordinary capitulation" that only underscored his guilt, confounding the maxim that an accused need not call *any* witnesses, present *any* evidence or otherwise prove his innocence. *E.g.*, Harriet Alexander, 'El Chapo' Guzman Facing Life as Lawyers Offer Extraordinary Capitulation in 'Trial of the Century' (Feb. 3, 2019), https://www.telegraph.co.uk/news/2019/02/03/could-chapo-guzman-walk-free-jury-decides-fate-end-telenovela/amp/; Alan Feuer, El Chapo's Defense? It Lasted Just 30 Minutes (Jan. 29, 2019), https://www.nytimes.com/2019/01/29/nyregion/el-chapo-trial.html (both as visited Mar. 21, 2019). Since the VICE report impugned the "presumption" that Guzman's jury followed the court's contrary instructions (*e.g.*, *U.S. v. Baker*, 899 F.3d 123, 134 (CA2 2018)), these flagrant distortions of the proof burden in criminal cases demonstrably rate as prejudicial.

others in advance to the coming inquiry and convinced them to lie to the court, falsely denying knowledge of the blockbuster child molestation charge. "'I had told them if you saw what happened in the news, just make sure that the judge is coming in and he's gonna ask us, so keep a straight face. So he did indeed come to our room and ask us if we knew, and we all denied it, obviously.'"[584]

- Why the lies? Fear of "serious" repercussions. "'I thought we would get arrested,' the juror said. 'I thought they were going to hold me in contempt.... I didn't want to say anything or rat out my fellow jurors. I didn't want to be that person. I just kept it to myself, and I just kept on looking at your [Hamilton's] Twitter feed.'" All this even though the court took pains to assure the jurors, "[redacted]" and "[redacted]"[585]

- Another external item jurors knew, apparently talked and seemingly misled the court about was an adulterous "affair" – widely reported during trial – a defense lawyer allegedly had with "one of his clients." "[M]oments" after answering negatively a "vague [*in camera*] question" from the judge – had the jury seen "any recent media coverage" around the time the alleged affair surfaced? – one of their number

---

[584] The panelists' evident dishonesty punctuated the prescience of Guzman's unsuccessful request – denied partly because of what the court termed its "very good rapport with this jury" – that [redacted] 6945; [redacted]

[585] [redacted]; *see also id.* 6945, 6949.

promptly "used a smartwatch to find [an] article" discussing it.[586]

- Finally, despite an extensive "jury selection process" that featured a detailed written questionnaire running 31 pages, the whistleblowing juror withheld during *voir dire* his burning desire to participate in the "'case of the century,'" a "'once-in-a-lifetime'" chance to be "part of history." Compounding that omission, the juror "kept" copious trial notes "against" the court's "instructions," perhaps with an eye toward future literary or commercial opportunities.

D. GUZMAN WAS ENTITLED TO A SEARCHING EVIDENTIARY HEARING AND A FAIR RETRIAL AS APPROPRIATE

1. Prevailing Legal Framework

The standards for obtaining a posttrial hearing on claims of jury misconduct are settled and straightforward.

First, as this Court recently reaffirmed, some form of exploration is "*mandatory*"[587] where "reasonable grounds for investigation exist."[588]

---

[586] *E.g.*, T. 5009 (DEFENSE COUNSEL: "It was … a rather salacious article and it's something which can be offensive and if it is offensive to certain people that can very well color their opinion of our client in this particular case"); *id.* 5012-13 (DEFENSE COUNSEL: article's nature and content may "particularly" offend women jurors, "spill[ing] over on Mr. Guzman").

[587] *Baker*, 899 F.3d at 134 (emphasis supplied); *Schwarz*, 283 F.3d at 98.

[588] *Moten*, 582 F.2d at 667; *accord*, *e.g.*, *Vitale*, 459 F.3d at 197 (posttrial jury hearing "*required*" upon "reasonable grounds for investigation") (emphasis supplied) (citing *Moon*, 718 F.2d at 1234).

Second, "reasonable grounds for investigation exist" when there is "clear, strong, substantial and incontrovertible evidence" that a "specific, non-speculative impropriety has occurred."[589]

Third, "incontrovertible" doesn't mean "irrebuttable; if the allegations were conclusive, there would be no need for a hearing."[590] The "issue, it must be remembered, is not whether the defendant is presently able to prove his case conclusively; rather, it is whether his showing is sufficiently strong to warrant an investigation to discover the truth."[591]

Fourth, a "duty to investigate" thus arises upon "concrete allegations" of "specific" instances of "inappropriate conduct that constitute competent and relevant evidence."[592]

---

[589] *Ianniello*, 866 F.2d at 543 (citations, internal quotation marks and brackets omitted); *accord*, *e.g.*, *U.S. v. Sabhnani*, 599 F.3d 215, 250 (CA2 2010) (similar) (collecting cases).

[590] *Ianniello*, 866 F.2d at 543; *see Vitale*, 459 F.3d at 197 ("allegations need not be conclusive").

[591] *Moten*, 582 F.2d at 668 (on reh'g pet.).

[592] *Ianniello*, 866 F.2d at 543 (citations and internal quotation marks omitted); *accord*, *e.g.*, *Schwarz*, 283 F.3d at 98-99 ("clear and specific allegations of inappropriate" behavior "plainly" comprised "'strong, substantial and incontrovertible evidence'" and were "sufficiently serious to warrant further inquiry") (quoting *Ianniello*, 866 F.2d at 543).

In short, if a defendant "comes forward *at any point in the litigation process*" with a mere "colorable or plausible juror-misconduct claim," the district court has an "unflagging duty" to "investigate."[593] Thus, while "district courts" may summarily *grant* a new trial based on jury exposure to extrinsic information, they may "not *deny*" one "without sufficient investigation" when "confronted with credible allegations of prejudicial outside influence."[594] That's because the *defendant – not* the government – is the express beneficiary of the Sixth Amendment's impartial jury guarantee.[595]

In Guzman's case, a whistleblowing juror's volunteering declarations against interest to a neutral third party easily vaults these modest hurdles.[596] As our **BACKGROUND** section attests, the VICE article identified a concrete and specific "series of events" indicating that

---

[593] *Tsarnaev*, 968 F.3d at 62 (emphasis supplied) (citations, internal quotation marks and brackets omitted).

[594] *Jordan*, 958 F.3d at 333, 336 (emphasis supplied) (citation and internal quotation marks omitted).

[595] *Ibid.* at 336 n.5; *accord*, *e.g.*, *U.S. v. Aiyer*, 433 F. Supp. 3d 468, 470, 472, 475-77 (S.D.N.Y. 2020) (confirming that "juror[s'] consider[ing] extraneous prejudicial information not admitted at trial[] may implicate a defendant's Sixth Amendment rights") (citations omitted).

[596] *Ante* n.572.

"very serious irregularit[ies] occurred during the trial of this" action.[597] "There is ample support for the propriety of a hearing in cases like this one."[598] Indeed, courts in our circuit and elsewhere routinely conduct posttrial hearings or reverse their denial on commensurate – if not slimmer and less troubling – proffers.[599]

With so "many unanswered questions" and "various unknowns" attending the juror's reports, departing from that wealth of precedent here – "fail[ing] to order a hearing now" – would "seem like willful blindness."[600] After all, juror impartiality determinations "frequently turn on the testimony of the juror[s] in question."[601]

More precisely, the tipster's revelations implicate three distinct but related types of misconduct that, separately and together, "certainly

---

[597] *Moten*, 582 F.2d at 660, 666.

[598] *Ibid.* at 666.

[599] *E.g.*, *Stone*, 2020 WL 1892360, at *3, *6, *17-*20, *25-*28, *32, *37, *39-*40; *Aiyer*, 433 F. Supp. 3d at 468, 470, 472, 475-77; *U.S. v. French*, 904 F.3d 111, 114-20 (CA1 2018); *U.S. v. Parse*, 789 F.3d 83, 86 (CA2 2015); *Ganias*, 755 F.3d at 132; *Sabhnani*, 599 F.3d at 249; *U.S. v. Nieves*, 354 F. App'x 547, 552 (CA2 2009); *Vitale*, 459 F.3d at 200; *Greer*, 285 F.3d at 166; *Schwarz*, 283 F.3d at 99-100; *Ianniello*, 866 F.3d at 541; *U.S. v. Colombo*, 869 F.2d 149, 150 (CA2 1989); *U.S. v. Carmona*, 858 F.2d 66, 69 (CA2 1988); *Moten*, 582 F.2d at 667-68.

[600] *Vitale*, 459 F.3d at 197-99.

[601] *Stone*, 2020 WL 1892360, at *28 (citations omitted).

warranted" robust exploration – especially in the absence of any discernible motive to lie.[602]

2. Jurors Consulted and Discussed Deplorable Extrinsic Information, Deliberating Prematurely

According to the juror's VICE interview, at least five panel members actively followed and openly discussed ongoing media accounts of the trial, including extra-record charges that Guzman drugged and raped children and one of his lawyers carried on an adulterous affair with a client. If so – and there's no reason to doubt the juror's word at this point[603] – the panelists blithely disobeyed emphatic orders against both behaviors and committed undeniable misconduct.[604] They thereby violated Guzman's Fifth and Sixth amendment rights to confront his accusers and to an impartial decision based solely on evidence properly

---

[602] *Moten*, 582 F.2d at 666.

[603] *Cf. Colombo*, 869 F.2d at 151 ("we must assume the truth" of affidavit asserting juror misconduct absent hearing).

[604] *E.g.*, *U.S. v. Cox*, 324 F.3d 77, 86 (CA2 2003) ("[p]remature deliberations present a number of dangers" touching the "Sixth Amendment right to a fair and impartial jury trial," and they "may constitute juror misconduct" where, as here, the jury is told to "refrain") (citations and internal quotation marks omitted); *U.S. v. Feng Li*, 630 F. Appx. 29, 32-33 (CA2 2015) (similar).

presented in court.[605] And those infirmities may well counsel reversal of Guzman's conviction and retrial before an untainted tribunal – especially where the district court conceded the child rape reports were "[redacted]" and "[redacted]."[606] As this Court has long recognized:

> It is well-settled that any extra-record information of which a juror becomes aware is presumed prejudicial. *See Remmer v. U.S.,* 347 U.S. 227, 229 (1954). A government showing that the information is harmless will overcome this presumption. *See id.* "Where an extraneous influence is shown, the court must apply an objective test, assessing for itself the likelihood that the influence would affect a typical juror." *Bibbins v. Dalsheim,* 21 F.3d 13, 17 (CA2 1994) (per curiam) (internal quotation marks omitted). A "trial court's post-verdict determination of extra-record prejudice must be an objective one," focusing on the information's probable effect on a "hypothetical average juror." *U.S. v. Calbas,* 821 F.2d 887, 896 n. 9 (CA2 1987); *see Bibbins,* 21 F.3d at 17. The court may not inquire into "the degree upon which the extra-record information was used in deliberations and the impression which jurors actually had about it." *Calbas,* 821 F.2d at 897 (citing Fed.R.Evid. 606(b)); *see Bibbins,* 21 F.3d at 17 (juror's affidavit as to how extrinsic information affected the thinking and voting of the jurors or the deliberations of the jury as a whole was inadmissible). However, in applying the objective

[605] *E.g.*, *Ianniello*, 866 F.2d at 541-42 (outside influences threaten Sixth Amendment "confrontation" and "fair trial" rights).

[606] [redacted]

> test, the court "may appropriately consider the circumstances surrounding the introduction of [the] information in making [its] determination." *Calbas,* 821 F.2d at 896 n. 9.
>
> In the evidentiary hearing in this case, the District Court asked jurors whether the extra-record information impacted their ability to be fair and impartial. Because this was a post-verdict hearing, that line of questioning was improper. *See Bibbins,* 21 F.3d at 17 (under Fed.R.Evid. 606(b), "[e]ven when a juror attests to receiving information outside the record, the juror may not go on to testify about the effect of that information on the juror's mental processes or the jury's deliberations"); *Ianniello,* 866 F.2d at 544 ("Whether the jury relied on improper evidence ... is not a question to be asked jurors....").[607]

The whistleblowing juror's VICE revelations check all the boxes identified in *Greer* and associated cases. Extra-judicial reports that Guzman drugged and raped minors would surely have a negative and

[607] *Greer*, 285 F.3d at 173-74; *see, e.g., Ianniello*, 866 F.2d at 544 (new trial "necessary if "'hypothetical average jury'" would've been "led astray"); *U.S. ex rel. Owen v. McMann*, 435 F.2d 813, 818, 820 (CA2 1970) (Friendly, J.) (prejudice determination turns on "nature of [extraneous] matter and its probable effect on a hypothetical average jury"; verdict inherently lacks due process where there's a high "probability that prejudice will result"); *U.S. v. Farhane*, 634 F.3d 127, 168 (CA2 2011) ("the law presumes prejudice from a jury's exposure to extra-record evidence").

disturbing "effect on a hypothetical average jury."[608] As defense counsel asked rhetorically, "[redacted]"[609]

3. By Disdaining Their Instructions and Lying about It on Judicial Inquiry, the Jurors Demonstrated Unfitness to Serve, Forcing Disqualification or Mistrial

Beyond spurning unequivocal warnings to avoid press coverage of the case, the juror's VICE remarks indicate that panel members brazenly lied to the district court when asked about it. They did so on at least two occasions that we know of. Tipped by the whistleblower that the court would privately inquire if they'd seen or discussed the sordid child rape allegations – after he'd learned of the coming interrogation by illicitly checking Hamilton's Twitter feed – all the jurors apparently got together and hatched a plan to falsely claim ignorance. And right after the court quizzed the panelists on reports of a Guzman lawyer's marital infidelity, at least one of them promptly turned around and looked up the story on a smartwatch.

---

[608] *Owen*, 435 F.2d at 820.

[609] [redacted].

The Sixth Amendment "expressly" entitles "a defendant in a criminal prosecution to a trial 'by an impartial jury.'"[610] Similarly, "A fair trial in a fair tribunal is a basic" ingredient of "due process," guaranteed by the Fifth Amendment.[611] A sworn juror who "deliberately" lies under judicial inquiry not only impairs those integral rights, but "is subject to criminal prosecution for perjury" and "contempt."[612] Accordingly, a new trial is required when a juror "fail[s] to answer honestly a material question" and a "correct response would have provided a valid basis for" dismissal.[613] And, notably, "bias" and "partiality" are "*presumed*" where, as here, jurors "deliberately conceal[] information" to avoid that fate.[614]

It follows that intentionally deceiving the Court about exposure to the most reprehensible outside allegations – and committing crimes along the way – rendered the offending jurors unfit to serve in Guzman's

---

[610] *Parse*, 789 F.3d at 110.

[611] *Ibid.* at 110-11 (citation and internal quotation marks omitted).

[612] *Ibid.* at 111.

[613] *Greer*, 285 F.3d at 170 (citation and internal quotation marks omitted).

[614] *Parse*, 789 F.3d at 111 (quoting *Colombo*, 869 F.2d at 151-52 (juror lied to prevent defense counsel from acting on information that might lead to her removal)) (emphasis supplied) (alteration and internal quotation marks omitted).

case, furnishing "good cause" to strike them or declare a mistrial and start afresh.[615] Indeed, an unfit jury, like a faulty reasonable doubt charge and a biased or an interested adjudicator, constitutes a "structural" defect in the composition of the trial mechanism, vitiating all the jury's findings and mandating reversal *per se*, without a showing of more tangible harm.[616] To put it in fine, a fair trial before unfit jurors is a logical impossibility and a contradiction in terms. It is simply inconceivable, the notions being mutually exclusive.

4. The Whistleblowing Juror and Others Concealed Material *Voir Dire* Information Supporting at Least an Inference of Bias and Meriting Disqualification for Cause

"The *voir dire* of prospective jurors, who have been placed under oath, 'is an important method of protecting a defendant's right to trial by' jurors who are [fair and] impartial."[617] As confessed in VICE, the tipster came to the jury selection process relishing an "histor[ic]," "'once-in-a-

[615] Fed. R. Crim. P. 23(b)(2)(B)-(3).

[616] *See generally*, *e.g.*, *Williams v. Pa.*, 136 S. Ct. 1899, 1909-10 (2016); *Sullivan v. La.*, 508 U.S. 275, 281-82 (1993); *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986); *Turner v. La.*, 379 U.S. 466, 471-74 (1965); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927); *French*, 904 F.3d at 119-20; *Estrada v. Scribner*, 512 F.3d 1227, 1235 (CA9 2008); *cf. People v. Neulander*, 34 N.Y.3d 110 (2019).

[617] *Parse*, 789 F.3d at 111 (quoting *Colombo*, 869 F.2d at 151).

lifetime'" opportunity to sit in the "'case of the century'" – if his prohibited note-keeping is any guide, perhaps because he craved future literary or commercial engagements. Several questions in the sworn juror questionnaire distributed before trial – identifying Guzman by popular nickname, mentioning the Sinaloa Cartel and summarizing the charges against him – surely should have elicited the tipster's ardent wish to serve.[618]

To repeat, a new trial is obligatory when "a juror fail[s] to answer honestly a material question on *voir dire*" and "a correct response would have provided a valid basis for a challenge for cause."[619] "Challenges for cause are generally based on actual bias, implied bias, or inferable bias."[620] And again, "bias" is "*presumed*" where, as here, a juror "deliberately conceal[s] information" for the "purpose of securing a seat

---

[618] A: 363-86; *see*, *e.g.*, A: 371 at Question 53 ("This case involves allegations about a criminal enterprise commonly known as a drug cartel. Do you have any feelings about serving as a juror in a case where the defendant has been accused of having connections with a drug cartel?"); A: 386 at Question 102 ("Is there anything about the nature of the charges or the facts of the case as they have been explained to you thus far that would affect your ability to serve as a juror in this case?").

[619] *Greer*, 285 F.3d at 170 (citation and internal quotation marks omitted).

[620] *Ibid.* at 172 (citing *U.S. v. Torres*, 128 F.3d 38, 43 (CA2 1997)).

on the jury."[621] After all, a mission "so powerful as to cause the juror to commit a serious crime" – lying "in order to be chosen as a juror" – intrinsically "reflects an impermissible partiality on the juror's part."[622] The tipster's misconduct in consciously withholding his intense desire to serve thus compelled reversal and retrial.

But there's more. Other questions in the sworn questionnaire explicitly asked if prospective jurors could accept, follow and apply the district court's "instructions" – specifically including instructions that would restrict them "solely [to] the evidence in th[e] case" and direct them to "avoid all media," "Internet" and "social" networking "coverage."[623] It now appears that multiple panelists answered those questions falsely, betraying inferable if not actual bias that should have kept them off the jury.[624]

---

[621] *Parse*, 789 F.3d at 111 (quoting *Colombo*, 869 F.2d at 152) (emphasis supplied) brackets and internal quotation marks omitted).

[622] *Ibid.* (quoting *Colombo*, 869 F.2d at 151) (brackets and internal quotation marks omitted).

[623] *See* A: 372 at Question 58; A: 384 at Question 93; A: 386 at Question 101.

[624] *E.g.*, *Greer*, 285 F.3d at 171 ("[a]ctual bias is bias in fact," whereas "inferable bias is available when actual or implied bias does not apply") (citing *Torres*, 128 F.3d at 43, 46-47).

5. A Full and Fair Hearing, with Defense Counsel Actively Participating, Was Necessary to Ensure the Appearance of Justice and Promote Public Confidence in the Integrity of Judicial Proceedings

Though judges normally enjoy "broad flexibility" in addressing claimed jury misconduct, cases involving "media publicity or other outside influences" constrain their leeway.[625] The "remedy for allegations of juror partiality" stemming from outside influence is thus a "hearing" with prejudice presumed.[626]

In that regard, it bears remembering that "both sides have a vital interest in learning everything there is to know about the matter."[627] As such, the requisite "exploration should be done not merely to the government's satisfaction, or to the satisfaction of the district judge, but also to the satisfaction of the defendant."[628] For a "defendant has a constitutional right to trial by an impartial jury," and the "interest of the

---

[625] *U.S. v. Thai*, 29 F.3d 785, 803 (CA2 1994) (citation and internal quotation marks omitted).

[626] *Smith v. Phillips*, 455 U.S. 209, 215 (1982); **SUBPOINT IX(D)(2)**; *cf. Martha Stewart*, 433 F.3d at 306 ("if *any* significant doubt as to a juror's impartiality remains in the wake of objective evidence of false *voir dire* responses, an evidentiary hearing generally should be held") (emphasis supplied).

[627] *Moten*, 582 F.2d at 660.

[628] *Ibid.*

accused in learning the whole story does not end with the trial."[629] To give those tenets effect, the "scope of the questioning … should be adequate to permit the entire picture to be explored,"[630] with "all interested parties permitted to participate."[631]

Since "each situation in this area is *sui generis*,"[632] courts have latitude to "decide the extent to which the parties may participate in questioning the witnesses."[633] With Guzman's case commanding unprecedented worldwide attention[634] – and intervening revelations clouding "confiden[ce]" in the judge's professed "rapport with this jury," ability to "really look[] at each" juror individually and "dr[a]w them out," and belief that they were heeding their "instructions" and "following [his]

---

[629] *Ibid.* at 660-61 (citation omitted).

[630] *Ibid.* at 667.

[631] *Schwarz*, 283 F.3d at 98 (citations and internal quotation marks omitted); *see Moten*, 582 F.2d at 660 ("no reason to limit" defendant's investigation unless "necessary to protect some other interest").

[632] *Vitale*, 459 F.3d at 197 (quoting *Moon*, 718 F.2d at 1234).

[633] *Ianniello*, 866 F.2d at 544; *see Moten*, 582 F.2d at 667 ("We leave to the district judge's sound discretion whether he should conduct the questioning personally or whether it should be done by someone else.").

[634] *See ante* nn. 567-70, 577.

direction[s]"[635] – the "appearance"[636] of fairness called for defense counsel's examining the witnesses personally[637] or, at the very least, submitting questions in writing.[638]

---

[635] T. 6945, 6949-50.

[636] *Vitale*, 459 F.3d at 199.

[637] *E.g., Stone*, 2020 WL 1892360, at *6 (given "unique circumstances" – another high-profile case shadowed by allegations of improper outside influence – court let defendant "question several jurors" over government objection); *U.S. v. Nix*, 275 F. Supp. 3d 420, 428 (W.D.N.Y. 2017) (counsel "permitted to ask questions" at posttrial juror misconduct hearing), *aff'd on reconsideration*, No. 14-CR-06181 EAW, 2018 WL 1009282 (W.D.N.Y. Feb. 20, 2018), *app. filed*, Nos. 18-619, -625 (CA2 Mar. 5, 2018); *Parse*, 789 F.3d at 91-92 (defense counsel appears to cross-examine juror on *voir dire* concealment); *U.S. v. Ganias*, No. 08 CR 224 (EBB), 2011 WL 4738684, at *3 (D. Conn. Oct. 5, 2011) (defense counsel questioned juror on undisclosed "bias or predisposition"), *aff'd in relevant part, rev'd on other* grounds, 755 F.3d 125 (CA2 2014), *rev'd on other grounds*, 824 F.3d 199 (CA2 2016) (*en banc*); *U.S. v. Sabhnani*, 529 F. Supp. 2d 384, 387 (E.D.N.Y. 2008) (defendants presented witness testimony at jury misconduct hearing), *aff'd in relevant part, vacated in part on other grounds*, 599 F.3d 215 (CA2 2010); *Ida v. U.S.*, 207 F. Supp. 2d 171, 175-76 (S.D.N.Y. 2002) (defendant called witnesses at evidentiary hearing on jury misconduct); *U.S. v. Ianniello*, 740 F. Supp. 171, 179-80 (S.D.N.Y. 1990) (defense counsel examined witnesses at post-remand jury misconduct hearing), *rev'd on other grounds*, 937 F.2d 797 (CA2), *modified on reh'g*, 952 F.2d 623 (CA2), *amended*, 952 F.2d 624 (CA2 1991), *rev'd on other grounds*, 505 US 317 (1992), *on remand*, 974 F.2d 231 (CA2 1992), *vacated on other grounds*, 8 F.3d 909 (CA2 1993) (*en banc*).

[638] *E.g.*, *Aiyer*, 433 F. Supp. 3d at 476; *Calbas*, 821 F.2d at 894, 897; *U.S. v. Greer*, 998 F. Supp. 399, 404 (D. Vt. 1998), *aff'd in relevant part*, *rev'd in part on other grounds*, 285 F.3d 158 (CA2 2002).

6. Conclusion

If a justice system's measure is how it treats the most unpopular and least sympathetic,[639] then ours may have failed Chapo Guzman by denying him the fair trial before an untainted jury to which he was nonetheless entitled – in spite if not *because* of the stigmas surrounding him. Since sunlight is the best disinfectant,[640] that prospect merited serious consideration, close investigation and a new trial as appropriate. Especially in view of their "outright lie[s]"[641] to the judge, only a "clarifying"[642] hearing could "effectively eliminate[] any concerns that the juror[s'] … impartial[ity] may have been compromised"[643] by their actively courting and consuming prejudicial extrinsic information. Anything shy of rigorous scrutiny risked creating an unsettling appearance of inequity.

---

[639] *See ante* nn. 1, 58.

[640] *See* L. Brandeis, Other People's Money 62 (1933).

[641] *U.S. v. Guzman Loera*, 2019 WL 2869081, at *22 (EDNY July 3, 2019).

[642] *Stone*, 2020 WL 1892360, at *6.

[643] *U.S. v. Johnson*, 954 F.3d 174, 182 (CA4 2020).

E. THE DISTRICT COURT ERRED IN DENYING RELIEF SUMMARILY, REQUIRING REMAND FOR THE HEARING GUZMAN DESERVES

1. Statement

To invoke the aphorism again, "Justice must satisfy the appearance of justice."[644] No empty slogan, that injunction has achieved immortality for good reason. Ensuring the appearance of justice "promote[s] public confidence in the integrity of the judicial process,"[645] thereby preserving respect for the rule of law. Both are staples in our "scheme of ordered liberty."[646]

Recall that one of Guzman's jurors voluntarily reached out to a disinterested journalist and went on video to report for public consumption – for the whole world to read and know – grave misconduct of their own and by their fellow jurors. To recap, the juror maintained that multiple panel members had pervasively violated their oath, and

---

[644] *E.g.*, *Liteky v. U.S.*, 510 U.S. 540, 564 (1994) (Kennedy, J., concurring) (citation, brackets and internal quotation marks omitted).

[645] *Cf. Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860, 865 (1988) (citations omitted).

[646] *Timbs v. Ind.*, 139 S. Ct. 682, 686-87 (2019) (citation and internal quotation marks omitted).

rampantly flouted the district court's instructions, in myriad ways detailed in **SUBPOINT IX(C)**.

Yet Judge Cogan dismissed these vexing accusations out of hand, deeming them flatly unworthy of even minimal inquiry or investigation.[647] **First**, the court opined that the VICE account fell short of the legal threshold for a hearing and didn't otherwise call for any follow up or exploration.[648] **Second**, the court asserted that the account wouldn't justify a new trial even if presumed true.[649] Those contentions and the analysis behind them are deeply flawed. We tackle them in reverse order, starting with a couple broader points.

Sure, the government and district court could parse, sugarcoat[650] and dissect to death on paper the whistleblowing juror's self-inculpatory

---

[647] *Contra Tsarnaev*, 968 F.3d at 121 (Toruella, J., concurring in part, joining in part, concurring in judgment) ("court's procedural discretion does not include a refusal to conduct any inquiry whatsoever") (citation omitted).

[648] *Guzman Loera*, 2019 WL 2869081, at *6-*13.

[649] *Ibid.* at *13-*24.

[650] For just one conspicuous example, the government and district court perpetually undersold the article as alleging only two isolated or primary instances of misconduct, when it actually says multiple jurors purposely sought out and illicitly followed the unprecedented media buzz – much of it enormously prejudicial – from gavel to gavel. ECF 604 at, *e.g.*, 49, 53-54, 62, 66, 68, 85, 93 (4/29/19); *Guzman Loera*, 2019 WL 2869081, at *6-*13, *15 n.14. That's one reason a hearing was so imperative: to determine how many jurors violated the court's instructions; exactly what they read

spurt of declarations against interest. But the defense never pretended his claims were "conclusive"[651] or "irrebuttable,"[652] as that hairsplitting approach – passing lip service to the appropriate standard aside[653] – functionally demands. And they didn't have to be at the preliminary stage; otherwise "there would be no need for a hearing."[654] The "issue, it must be remembered, is not whether the defendant is presently able to prove his case conclusively; rather, it is whether his showing is sufficiently strong to warrant an investigation to discover the truth."[655]

Sufficiently strong to warrant investigation is what the juror's revelations inescapably were. Were this any other defendant,[656] few

---

and saw; whether, when and how frequently they discussed it; and precisely who said what to whom.

[651] *Ianniello*, 866 F.2d at 543.

[652] *Ibid.*

[653] *Guzman Loera*, 2019 WL 2869081, at *6.

[654] *Ianniello*, 866 F.2d at 543.

[655] *Moten*, 582 F.2d at 668 (on reh'g pet.); *accord French*, 904 F.3d at 117 ("defendants' initial burden is only to establish that their claim of juror misconduct is colorable or plausible. They need not show at the outset that their claim is so strong as to render contrary conclusions implausible.") (citation and internal quotation marks omitted).

[656] *Neulander*, 34 N.Y.3d at 113, 111 N.Y.S.3d at 261 ("*every* defendant has a right to be tried by jurors who follow the court's instructions, do not lie … about their misconduct during the trial, and do not make substantial efforts to conceal … their

would seriously dispute that they present "clear, strong, substantial and incontrovertible evidence"[657] – *as this Court liberally construes those terms* – of "specific, non-speculative impropriet[ies]."[658] To that end, as we said before, the Court has long "*required*" posttrial misconduct hearings upon a relatively modest showing of "reasonable grounds [to] investigat[e]."[659] Here, a juror with no obvious ulterior motives voluntarily approached a neutral third party to accuse themselves and their counterparts, in a published report circulated across the globe, of (a) brazenly violating their oath and thumbing their collective nose at the court's instructions, by (b) actively searching for and exposing themselves to the most incendiary publicity throughout Guzman's trial, and then (c) allegedly colluding in lying to the court's face when asked about it. If

misconduct when the court conducts an inquiry with respect thereto") (emphasis supplied) (citation and internal quotation marks omitted).

[657] *Ianniello*, 866 F.2d at 543 (citations, internal quotation marks and brackets omitted).

[658] *Ibid.*

[659] *Vitale*, 459 F.3d at 197 (citing *Moon*, 718 F.2d at 1234) (emphasis supplied); *accord Baker*, 899 F.3d at 134 (some form of exploration "*mandatory*" upon "reasonable grounds for investigation") (emphasis supplied); *Schwarz*, 283 F.3d at 98 (similar).

those circumstances don't provide reasonable grounds to investigate, then what would qualify?

In this light, the government's and district court's eternal nitpicking bristled with circular reasoning and proved too much. Like the juror's own contentions, it merely identified "various unknowns"[660] and raised "many unanswered questions,"[661] serving only to magnify the need for a hearing. After all, resolving unanswered questions is a hearing's central office.[662]

Against that backdrop, leaving the juror's alarming allegations unexamined – whitewashing and sweeping them under the rug due largely to Guzman's notoriety – indelibly tainted the verdict's legitimacy.[663] And *that* regrettable outcome upends the greater solicitude

---

[660] *Vitale*, 459 F.3d at 197-99.

[661] *Ibid.*

[662] *E.g.*, *Martha Stewart*, 433 F.3d at 306 ("if *any* significant doubt as to a juror's impartiality remains in the wake of objective evidence of false *voir dire* statements, an evidentiary hearing generally should be held") (emphasis supplied).

[663] *See Tsarnaev*, 968 F.3d at 121 (Toruella, J., concurring in part, joining in part, concurring in judgment) ("district court's refusal to inquire – at the government's behest – left much to be desired in the way of certainty about … jurors' impartiality").

traditionally accorded infamous defendants in high-profile cases,[664] to curb popular "passions"[665] and check the "community's"[666] thirst for "revenge or retribution."[667]

If that consequence wasn't dismaying enough, letting the cloud linger would also have wider and more damaging institutional implications. It would stain the reputation for uncompromising fairness and objectivity that marks our system and makes it the world's envy, creating a result-oriented perception diminishing us both at home and abroad.[668] Even more pointedly, it would belie the district court's eloquent post-verdict ode to American exceptionalism,[669] reducing it to idle words and unfulfilled promises. And it would make us all seem like hypocrites

---

[664] *See, e.g.*, *Tsarnaev*, 968 F.3d at 34, 58; *Patriarca v. U.S.*, 402 F.2d 314, 317-18 (CA1 1968).

[665] *Dennis v. US*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring).

[666] *Spaziano v. Fla.*, 468 U.S. 447, 476-78, 480 (1984) (Stevens, Brennan and Marshall, JJ., concurring and dissenting).

[667] *Ibid.*

[668] *Cf. Tanner v. U.S.*, 483 U.S. 107, 120-21 (1987) (legitimacy of "system that relies on the decisions of laypeople" hinges on "community's trust").

[669] T. 7105-06 ("We're one of the few countries in the world that trusts our citizens to make these important kinds of decisions over other people's lives. You have demonstrated why we do that and why we have the confidence in it. Not with regard to the decision you reached, but the way you went about it, was really quite remarkable; and frankly, made me very proud to be an American.").

in the bargain, shattering our pretenses to superiority and rendering our system only incrementally better than those Guzman allegedly "corrupt[ed]."[670] It would, in short, make a "farce" of the core virtues thought to epitomize "our system of justice."[671]

With all that in mind, the government and district court's resisting so strenuously "an investigation to discover the [full] truth"[672] and scope of what happened here can only rank as disappointing. It begs the question: Why protest so much? Why go to such convoluted lengths – expending so much ink and paper – to avoid the sort of straightforward posttrial inquiry that's commonly conducted in our Circuit and elsewhere?[673] What was everyone so afraid to find out? To ask those questions is to certify a hearing's necessity.

---

[670] ECF 604 at 6.

[671] *Parse*, 789 F.3d at 126 (Straub, J., concurring).

[672] *Moten*, 582 F.2d at 668 (on reh'g pet.).

[673] *See ante* nn. 587-88, 599, 626, 637-38.

2. Prejudice Is Presumed when Jurors Deliberately Consult Extrinsic Information in Violation of Their Instructions and Falsely Deny It upon Inquiry; the District Court Wrongly Reversed That Presumption and Insidiously Shifted the Burden of Proof

Having spent countless words picking the VICE article apart and quibbling over small details,[674] the district court basically asked the reader to forget all that and purported to presume the article's truth, summarily denying relief without a hearing.[675] Even assuming its truth, that court ventured, a hearing was unnecessary because multiple jurors' starkly violating their oath and chronically flouting the court's instructions – by regularly tracking a storm of sensational media coverage, unprecedented in scope and intensity – only to lie about it when asked somehow didn't prejudice Guzman.[676] No harm, no foul, as it were – even if the coverage included bombshell allegations, child rape among them, that the court itself deemed too inflammatory to admit at trial. And

[674] *Ibid.* n.648.

[675] *Ibid.* n.649.

[676] *Ibid.*

even if it prematurely pronounced the defendant guilty by an overwhelming margin.[677]

Not so fast. This Court should reject that device for what it was: an admitted attempt to smuggle conventional harmless error analysis[678] into a setting where the exposure's likely impact is evaluated for objective influence on a hypothetical average jury, not subjective effect on the actual jurors in Guzman's case – and where prejudice is thus presumed, with reversal all but automatic for material misrepresentations upon judicial inquiry.

a. In taking that prohibited tack – trying to wedge a square peg into a round hole – the district court openly embraced the proposition that it didn't really matter *what* extraneous information the jurors may have seen, read or heard, or how many of them may have seen, read,

---

[677] *See ante* n.583.

[678] *Guzman Loera*, 2019 WL 2869081, at, *e.g.*, *8 n.6 (miscasting "prejudice" as the "key factor"); *12 (insisting that any premature deliberations were "harmless"); *id.* at *15-*19 (miscasting "prejudice" as the "touchstone"; asserting that "defendant [cannot] show the necessary level of prejudice [to] warrant a new trial"; repeating errant refrain that "defendant cannot show prejudice"; calling "news coverage['s]" nature "harmless"; and demanding an affirmative "showing of prejudice"), *id.* at *19 n.19 (again miscasting "prejudice" as the "key factor"); *id.* at *21 (reiterating that "defendant cannot identify any prejudice" from premature deliberations).

heard or discussed it.[679] For in that court's view, Guzman was such a bad guy – "one of the world's most notorious criminals,"[680] responsible for "horrific"[681] and "brutal crimes"[682] – and the case against him was so strong that *no* outside information was capable of hurting his defense.[683] In other words, extrinsic injury to this defendant was legally and factually impossible; he's functionally immune from harm, essentially prejudice-proof. Chapo planned the JFK assassination? So what? El es el Diablo. Chapo arranged the 9/11 attacks? Big deal. The government's evidence was crushing.[684]

---

[679] *Guzman Loera*, 2019 WL 2869081, at *18.

[680] ECF 604 at 1, 36.

[681] *Ibid.* at 75.

[682] *Ibid.* at 36.

[683] *Ante* n.679 (faced with "[o]verwhelming" evidence of guilt, "defendant cannot show prejudice" (sic) from jury exposure to "extraneous information, … regardless of what that information may be" and "no matter how egregious [it] is").

[684] Perhaps sensing its outlandishness, the district court sought to temper this absolutist approach in a glancing footnote, suggesting things might be different if the government hadn't charged Guzman with "murder conspiracy" or introduced extensive "evidence of violence." *Ibid.* at *17 n.17. The attempted qualifier falls flat. Because the murder conspiracy was improperly charged as a substantive CCE predicate, much of the violence evidence was subject to exclusion. *See ante* **POINT III**.

b. But those express premises – not to mention the court's paradoxical paeans to the performance of Guzman's actual jury[685] – contradict and capsize the settled legal principles controlling this **POINT**'s disposition. True, those key tenets get fleeting nods in a few lonely snippets of the opinion below.[686] But having grudgingly acknowledged the guiding precepts, the bulk of its 45 pages studiously discard them and substitute forbidden harmless error scrutiny.

Put more bluntly, the district court's opinion says one thing and effectively does the opposite. To briefly repeat, the operative rules are these:

i. *Any* extra-record information of which a juror becomes aware is *presumed* prejudicial. That is, the law *presumes* prejudice from a jury's exposure to extra-record evidence.[687] This being so, the crux of the district court's decision amounts to an explicit exercise in burden shifting. Turning the applicable presumption on its head, the

---

[685] *Guzman Loera*, 2019 WL 2869081, at *12, *16, *18, *19, *21. In the space of a single paragraph – two sentences, actually – the court simultaneously described the jurors' conduct as "certainly undesirable," a "violation of their oath" *and* "exceptional." *Id.* at *19. You can't have it both ways.

[686] *Ibid.* at *14.

[687] *See ante* 167-69, 174 & sources cited.

opinion thus demanded that *Guzman* prove – rather than the *government* dispel – the presence of cognizable harm.[688]

aa. To make matters worse, the court imposed an even stricter prejudice standard than ordinary harmless error analysis entails. To prove a trial error harmless, the *government* must demonstrate that it had no "substantial and injurious effect or influence on the jury's verdict"[689] or that there was no "reasonable possibility" it "might have contributed to the conviction."[690] By contrast, the district court forced *Guzman* to establish that media exposure was a "determinative factor" in the conviction or that the verdict was otherwise "based on" outside information – essentially a heightened showing of proximate cause. That can't be the law. "Time and again, the Supreme Court has emphasized that [even] a [customary] harmless-error inquiry is not the same as a review for whether there was sufficient evidence at

---

[688] *Guzman Loera*, 2019 WL 2869081, at, *e.g.*, *17 ("defendant [cannot] show the necessary level of prejudice); *id.* at *18 ("defendant cannot show prejudice"); *id.* (demanding an affirmative "showing of prejudice"); at *21 ("defendant cannot identify any prejudice").

[689] *U.S. v. Groysman*, 766 F.3d 147, 155 (CA2 2014) (citations and internal quotation marks omitted).

[690] *Chapman v. Ca.*, 386 U.S. 18, 24 (1967) (citation and internal quotation marks omitted).

trial to support a verdict."[691] Yet the district court overtly conflated the two – in a context defying harmless error analysis altogether.

bb. Meanwhile, even as it shifted and exaggerated the burden of proving prejudice, the court took pains to play down the appalling character of the child rape allegations. Rewriting the record, its opinion thus claimed that the court had "exclude[d] this evidence" as "irrelevant to either the crimes charged in the indictment or [witness] credibility."[692] In fact, the record reflects that the court found the "inflammatory nature" of "sexual activities with minors" – and the "undue prejudice" this evidence would "cause" – to "completely" and "entirely outweigh[]" any "minisucle relevance" or "probative value it may have."[693] Tellingly, the court made that determination – child rape

---

[691] *Jensen v. Clements*, 800 F.3d 892, 902 (CA7 2015).

[692] *Guzman Loera*, 2019 WL 2869081, at *15.

[693] A: 423. Insofar as it rebranded the child rape allegations nonprejudicial because "collateral" and "irrelevant" to "the crimes charged in the indictment," the opinion below missed the point "entirely." *Guzman Loera*, 2019 WL 2869081, at *16. In fact, it turned the point "entirely" upside down. *Id.* The allegations are a form of character evidence. And it's fundamental that character evidence "is *not* rejected because character is irrelevant; on the contrary, it is said to weigh *too much* with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, *despite* its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise

accusations are uniquely prejudicial – *despite* all the other evidence of "gruesome" violence the jury would "hear[] and s[ee]."[694] Indeed, notwithstanding the nature and severity of the crimes charged, the court "precluded" even an alleged *adult* rape as "undu[ly]" and "obvious[ly]" prejudicial under Rule 403, recognizing that sexual abuse evidence is categorically different in quality and kind.[695] How much worse the purported serial rape of *children* – each putative victim someone's young daughter or sister? Try as it might, the district court couldn't sanitize or sterilize the ugly child rape accusations after the fact.

ii. Disabling bias is similarly *presumed* when a juror deliberately conceals information to secure a seat or avoid dismissal.[696] And the district court, for its part, likewise professed to presume that

---

and *undue prejudice*." *Old Chief v. U.S.*, 519 U.S. 172, 181 (1997) (emphasis supplied) (citation and internal quotation marks omitted).

[694] *Ante* n.692.

[695] A: 396, 398-99, 401.

[696] *Ante* 170, 172-73 & sources cited.

Guzman's jurors *did* falsely deny exposure to at least the child rape accusations when the court asked them about it during trial.[697]

aa. It follows from that avowed assumption that intentionally deceiving the Court about exposure to the most reprehensible outside allegations – and committing crimes along the way – rendered the offending jurors unfit to serve in Guzman's case, furnishing "good cause"[698] to strike them or declare a mistrial and start afresh.[699] That's especially so where one or more of the same jurors, having told the court they'd seen no reports of defense counsel's extra-marital affair with a client, promptly turned around and looked them up – another act of flagrant disobedience the opinion also claimed to credit. And to reiterate, an unfit jury – like a faulty reasonable doubt charge and a partial or an interested adjudicator – constitutes a "structural" defect

---

[697] *Guzman Loera*, 2019 WL 2869081, at *13 n.11, *22, *23. Having contemporaneously assured the jurors that they'd done nothing wrong and *weren't* in trouble (*ante* 161 & sources cited), the court's opinion nevertheless ascribed their lies to "fear" they *would* "get[] in trouble" as opposed to "partiality" or other suspect motives (*Guzman Loera*, 2019 WL 2869081, at *13 n.11) – another incongruity that only further invites a hearing.

[698] Fed. R. Crim. P. 23(b)(2)(B)-(3).

[699] *Accord People v. Havner*, 798 N.Y.S.2d 476, 477 (N.Y. App. Div. 2005) (juror properly discharged for disregarding court's instructions by discussing case outside courtroom and then lying when questioned about discussion's substance).

in the composition of the trial mechanism, vitiating all the jury's findings and mandating reversal *per se*, without a showing of more tangible harm.[700]

Why? For one, "jurors who do not take their oaths seriously threaten the very integrity of the judicial process"[701] – a "fundamental" institutional "interest" that transcends the "protect[ion]" of a "defendant from erroneous conviction."[702] For another, the "effects"[703] of a dishonest, unfit jury – a jury peppered with presumed liars – are "too hard to measure"[704] and almost "inevitably signal fundamental unfairness,"[705]

---

[700] *Ante* 171 & n.616.

[701] *Tsarnaev*, 968 F.3d at 62 (citation, internal quotation marks and brackets omitted).

[702] *McCoy v. La.*, 138 S. Ct. 1500, 1511 (2018) (citations and internal quotation marks omitted); *cf. Williams*, 136 S. Ct. at 1909 ("appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part").

[703] *McCoy*, 138 S. Ct. at 1511.

[704] *Ibid.*

[705] *Ibid.*

making the "efficiency costs"[706] of an individualized prejudice inquiry "unjustifi[able]."[707]

Thus, contrary to the district court's bald supposition, judicial integrity – *not* "prejudice"[708] – is the "touchstone"[709] when jurors lie to the judge's face and commit other acts of dishonesty in direct response to questions about material matters.[710] Because particularized "harm" is "irrelevant" to the "underlying" values at stake – vindicating the integrity of the judicial process and ensuring it appears fair to all who observe it – the misconduct "counts as structural" and is "not amenable" to review for

---

[706] *Weaver v. Ma.*, 137 S. Ct. 1899, 1908 (2017).

[707] *Ibid.*

[708] *Guzman Loera*, 2019 WL 2869081, at *18.

[709] *Ibid.*

[710] *See Neulander*, 34 N.Y.3d at 114, 111 N.Y.S.3d at 262 ("dishonest behavior by a juror purposefully selected to be a fair and objective arbiter of the facts in the case causes irredeemable injury to the judicial system and the public's confidence in it").

harmlessness.[711] Reversal and retrial are therefore "automatic[,]"[712] with no "need first to show prejudice."[713]

A persuasive First Circuit opinion illustrates the point. After their drug convictions, the defendants in *U.S. v. French* sought a new trial and an evidentiary hearing based on alleged jury misconduct.[714] Like Guzman, they argued that a juror had improperly concealed "possible bias" by giving materially false answers in a written questionnaire and during voir dire.[715]

The district court summarily denied relief.[716] As relevant here, it "concluded" – like Judge Cogan – that "even if Juror 86 had committed misconduct, there was no prejudice to defendants because the government had a strong case."[717]

---

[711] *Ante* n.706; *cf. Williams*, 136 S. Ct. at 1909 ("Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.").

[712] *Weaver*, 137 S. Ct. at 1907 (citation and internal quotation marks omitted).

[713] *McCoy*, 138 S. Ct. at 1511-12 (footnote omitted).

[714] 904 F.3d at 113-16.

[715] *Ibid.* at 113-16, 120.

[716] *Ibid.* at 116.

[717] *Ibid.* at 119.

The First Circuit reversed and remanded for investigation, "defendants hav[ing] made a colorable claim that a biased juror was seated."[718] Since "rejecting a claim of error as harmless presupposes the existence of the error in question," the court began by adopting the district court's assumption – mirroring Judge Cogan's approach here – that defendants' allegations were true: that "Juror 86 was, in fact, biased."[719] On that assumption, the court then spelled out the "decisive point":[720]

> [W]e view the presence of a biased juror as structural error – that is, per se prejudicial and not susceptible to harmlessness analysis. While we have not previously stated the matter so directly, precedent from this court and from the Supreme Court dictates that conclusion. The Supreme Court has explained that, though structural error is rare, it is the appropriate finding for "defect[s] affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself," *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), and for those errors that "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence,'" *Neder v. United States*, 527 U.S. 1, 8–9 (1999)

[718] *Ibid.*

[719] *Ibid.*

[720] *Ibid.*

> (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)). In that vein, the Supreme Court has held that trial before a biased judge is structural error, *Tumey*, 273 U.S. [at] 522-24, 535, as is trial before a jury whose impartiality has been fatally compromised, *Turner*, 379 U.S. [at] 471–74….
>
> Other circuits have squarely held that the presence of a biased juror in a criminal case is structural error. *See Estrada*, 512 F.3d [at] 1235. We think it only logical to agree and to state the rule clearly today: The presence of a juror whose revealed biases would require striking the juror for cause in a criminal case is structural error that, if preserved, requires vacatur.
>
> Because the presence of a biased juror is structural error, *the government's contention that its case against defendants was very strong is of no moment*. If defendants can establish Juror 86's disqualifying bias after [] investigation by the district court, *the conviction would necessarily be set aside regardless of the strength of evidence*.[721]

That rationale applies with equal force here, where the opinion below waved the "decisive point" off by three unsourced sentences buried in a peremptory footnote.[722]

iii. Where extraneous influence is shown, courts apply an objective test focusing on the information's probable effect on a typical

---

[721] *Ibid.* at 119-20 (emphasis supplied).

[722] *Guzman Loera*, 2019 WL 2869081, at *21 n.23.

or hypothetical average jury. They thus look to the extrinsic material's objective nature, reversing if it would have led a hypothetical average jury astray.[723] It follows that the district judge blundered in fixating on his own assessment of *this* jury's subjective behavior,[724] applying a faulty standard and asking the wrong question. It's one thing to "consider the circumstances surrounding" the extrinsic information's "introduction" – how it came before the jury.[725] It's another to exhaustively examine every aspect of the trial's conduct so as to bootstrap harmless error analysis. The first is permissible,[726] the second prohibited.

aa. *Neulander*, a New York appellate ruling recently upheld and endorsed by the state's top court, is instructive in this regard. A post-verdict hearing established that one of Neulander's jurors exchanged during trial text messages "with third parties about the

---

[723] *Ante* 167-68 & sources cited.

[724] *See ibid.* n.685. Elsewhere, the opinion improperly blurred objective and subjective review, winking at the "hypothetical, average jury" standard while canvassing what Guzman's *actual jurors* ostensibly said and did and weighing the "subjective impact" the child rape allegations reportedly had on them. *Guzman Loera*, 2019 WL 2869081, at *9 n.7, *18. The Court should discount this double-talking end-run of the appropriate legal analysis. *See also* n.741, *post*.

[725] *Ante* 167-68 & sources cited.

[726] *Ibid.*

trial." As in this case, the jury was instructed "numerous times to report any such communication to the court," but the offending juror "failed to do so." In sum, the record showed that the juror, like her counterparts here, "repeatedly disregarded the court's instructions, and actively concealed and was untruthful about her numerous violations." She "failed to report" her improper communications and then "actively concealed and lied about them" during "the court's inquiry into the misconduct."[727]

An appellate panel reversed Neulander's murder conviction, finding violations of "rights" that are "substantial and fundamental to the fair and impartial administration of a criminal trial."[728] It held, in language just as pertinent here, that due to the juror's

> flagrant failure to follow the court's instructions and her concealment of that substantial misconduct, defendant, through no fault of his own, was denied the opportunity to seek her discharge during trial on the ground that she was grossly unqualified and/or had engaged in substantial misconduct….
>
> Our focus is not on the time of … the misconduct['s discovery]. Instead, our focus is [the] juror['s] failure to follow the court's instructions, her failure to report her own misconduct … and her

[727] *People v. Neulander*, 80 N.Y.S.3d 791, 795, 797 (N.Y. App. Div. 4 2018).

[728] *Ibid.* at 797.

> concealment of that misconduct …, evidencing a consciousness that she had engaged in misconduct, which denied defendant the *opportunity* to pursue a remedy…. Under the dissent's approach, a juror's flagrant disregard of court rules and admonitions and her active concealment of her own misconduct becomes "speculative" … because the juror was successful in deliberately concealing and withholding the misconduct from the court and defendant until after the verdict. We conclude that there is nothing speculative about the denial of defendant's substantial right and concrete *opportunity* to pursue a remedy … based on the juror misconduct that is patent on this record.[729]

Unanimously sustaining that determination, New York's highest court agreed that the wayward juror's "conduct disregarded the [judge's] plentiful instructions" and when "such conduct was brought to light, the juror was repeatedly and deliberately untruthful."[730] The juror's "blatant disregard for the court's instructions coupled with her purposeful dishonesty and deception when her actions and good faith … came into

[729] *Ibid.* at 796.

[730] 34 N.Y.3d at 113-14.

question" thus "compel[led]" the court to "affirm publicly the importance of juror honesty."[731]

c. Straining against the logic and strength of cases like *Neulander* and *French*, the opinion below sought refuge in an unpublished district court ruling from Chicago,[732] *U.S. v. Spano*,[733] that's both digressive and unpersuasive.

i. Evidence Rule 606 facially barred the news item proffered there, recounting "statement[s] made [and] incident[s] that occurred"[734] "during the jury deliberations."[735]

---

[731] *Ibid.* at 113-15, 261-62. Noting that New York law didn't require an actual prejudice showing in *Neulander* (*see Guzman Loera*, 2019 WL 2869081, at *19 n.19) merely begs the question presented: whether trial before unfit jurors who materially defy their instructions and *lie to the court's face when questioned about it* likewise mandates automatic reversal – without a specific prejudice showing – as a federal structural error.

[732] *See Guzman Loera*, 2019 WL 2869081, at *16-*17.

[733] 2002 WL 31681488 (N.D. Ill. Nov. 27, 2002), *aff'd*, 421 F.3d 599 (CA7 2005).

[734] Fed. R. Evid. 606(b)(1).

[735] 421 F.3d at 605. Since this case involves *pre-deliberation* improprieties, the district court mislabeled a hearing a "futil[ity]" that would "add nothing," Rule 606 limiting inquiry to "whether" jurors "were exposed" to extrinsic information. *Guzman Loera*, 2019 WL 2869081, at *8, *9, *12 (citation and internal quotation marks omitted). To the contrary, the court was free – if not obliged – to explore all "the circumstances surrounding" the information's "introduction" (*Calbas,* 821 F.2d at 896 n.9), including: exactly what external information came before the jury – which extraneous items members read and saw – and how it got there; whether, when, how many and how often jurors discussed it; and precisely who said what to whom. Put differently,

ii. More fundamentally, the non-binding opinion clashes with controlling precedent from this Court.

aa. Unlike *Ianniello* and *Moten* – seminal authorities the opinion below acknowledged mainly by trying to distinguish their facts but not their reasoning[736] – it didn't apply a

---

Rule 606 posed no bar to determining "whether" and what "premature deliberations" may have "occurred," as the opinion itself elsewhere acknowledged. *Guzman Loera*, 2019 WL 2869081, at *12 (citation and internal quotation marks omitted). [*Baker*, the case the court cited for the futility proposition, concerned *only* "statements made by the jurors themselves" – *not* "outside influences" – so it's beside the point. 899 F.3d at 131 (citation and internal quotation marks omitted).] On the district court's expansive reading, Rule 606 would make jury misconduct hearings superfluous and all but impossible to obtain – a manifestly untenable suggestion. *See ante* 174-76 & nn. 626, 631, 637-38 and sources cited.

On the other hand, to the extent the court's "no prejudice" argument credited and relied on the tipster's reported claim that the alleged child rapes didn't "h[a]ng" the jurors "up" or "change nobody's mind" (*Guzman Loera*, 2019 WL 2869081, at *4, *8 n.6, *9 n.7, *11), it plainly ran afoul of Rule 606(b)(1). Under that provision, as relevant here, the court may not entertain "evidence of a juror's statement" about "the effect of anything on that juror's or another juror's vote" or "any juror's mental processes concerning the verdict."

By skewed interpretation and application, the district court thus wielded Rule 606 as both sword (to deny merits relief for purported want of prejudice) and shield (to block a hearing that might well have sufficiently fortified the *prima facie* prejudice showing to warrant relief on the merits). Far from "ask[ing]" the court to "credit" only the "juror[] statements" and other "parts" of the "VICE article" that "weigh in his favor" (*Guzman Loera*, 2019 WL 2869081, at *8 n.6, *22), Guzman merely calls for faithful application of Rule 606 as written.

[736] *See Guzman Loera*, 2019 WL 2869081, at *17. Painting *Ianniello* and *Moten* as outliers involving "unusual" facts and "unique circumstances of extremely prejudicial conduct" (*id.*) is specious. **First**, as this Court has long emphasized, "each situation in this area is *sui generis*." *Vitale*, 459 F.3d at 197 (quoting *Moon*, 718 F.2d at 1234). **Second**, pooh-poohing those cases ignores the mountain of others – in our Circuit

presumption of prejudice or force the prosecution to rebut the presumption. Nor did it consider the article's objective effect on a hypothetical average jury.

bb. Instead, the court demanded a "reasonable possibility"[737] that the article had a "prejudicial effect upon the jury's verdict,"[738] which it equated with a showing that the evidence was legally insufficient for a rational jury to convict – the standard for acquittal[739]

---

and elsewhere – convening posttrial hearings or reversing their denial on proffers equivalent to, if not slimmer and less troubling than, Guzman's. *See ante* n.599. **Third**, at issue here are jurors who systematically violated their oath and instructions by pervasively consulting inadmissible outside information – including shocking allegations that the defendant drugged and raped young girls – then lying to the court's face when asked about it. Those "facts," "circumstances" and "conduct" are also "unusual," "unique" and "extremely prejudicial." *Guzman Loera*, 2019 WL 2869081, at *17. **Fourth**, by refusing to investigate the full extent of those "unusual" facts and "unique circumstances of extremely prejudicial [jury mis]conduct," the district court committed the same sin as its counterparts in *Ianniello* and *Moten*, leaving too "many questions remain[ing] unanswered." *Id.*

[737] 2002 WL 31681488, at *2 (citation and internal quotation marks omitted).

[738] *Ibid.*

[739] *Ibid.* at *5 ("To conclude that such an effect was likely, one would have to assume that the jury would take an extraneous item that was irrelevant to the charges and use it as a basis for a finding of guilt. In other words, defendants' theory has to be that hearing about Spano's mob connections would so inflame the jury that it would cause them to ignore *an insufficiency of evidence* and find Spano guilty...") (emphasis supplied).

that, as explained, has no place in even ordinary harmless error analysis.[740]

cc. Worse, the opinion leaned heavily on the "judge's" subjective "assessment of the [actual] jury itself, based on the [*Spano*] jurors' [actual] behavior during the trial,"[741] which it proceeded to describe in exquisite detail.[742]

dd. Indeed, the opinion rests exclusively on Seventh Circuit precedent, notably failing to cite a single case from the Second (or any other) Circuit.

iii. Finally, nothing in *Spano* indicates that his jurors – unlike Guzman's – either disobeyed their instructions "not to read, watch or listen to anything in the media about the case" or blatantly lied

---

[740] *See ante* 189-90.

[741] 2002 WL 31681488, at *2 (citations omitted); *see also id.*, *e.g.*, at *3 ("The jury in *this* case can only be described as exemplary.") (emphasis supplied); *id.* ("*This* was not a jury that was likely to have been affected by references to prejudicial matters they knew they were not to consider in arriving at their verdict.") (emphasis supplied); *id.* at *5 ("Everything we know about the attitude and behavior of *this* jury makes [defendants'] theory implausible in the extreme.") (emphasis supplied).

[742] *Ibid.* at *3-*6, *8.

to the court when asked "whether they had seen or read particular items."[743]

iv. Mimicked almost verbatim, *Spano* formed the fulcrum of and template for the district court's entire no-prejudice argument. But its reliance was sorely misplaced. *Spano* squarely contravenes binding authority from this Court and is wholly unpersuasive. It simply has no application here.

***

In summarily denying relief for putative lack of prejudice, the district court wrongly analyzed a structural error for harmlessness, mistakenly applying a heightened and unduly stringent harmless error standard to boot. That aspect of its decision therefore cannot stand.

3. The District Court Erred in Leaving the Startling VICE Report Completely Unexamined

SUBPOINT IX(E)(1) unmasks the major analytic and conceptual flaws dooming the district court's lengthy bid to defang the juror's allegations and poke holes in the VICE report. To quickly review:

a. In professing to presume the report's truth and

[743] *Ibid.* at *1.

summarily denying relief anyway, the court reverted to its pattern of selling the juror's assertions short, refusing to give the article full play or recognize it as the tip of a probable iceberg. Fairly read, the juror's VICE remarks accused themselves and several fellow jurors of systematically betraying their oath and consciously spurning their instructions by "routinely" and "constantly" monitoring the media blitz throughout Guzman's trial. They *didn't* merely imply that some jurors viewed "two specific topics of news coverage," as the opinion wishfully spun and vainly tried to dampen the situation.[744]

Thus, despite the strawman the opinion set up and proceeded to tear down, Guzman urged only that the juror's self-inculpatory VICE "allegations" were facially "reliable," "truthful and trustworthy" enough to warrant *exploration at a hearing – not* that they were "inherently" so.[745] The *hearing*, in turn, would determine if the allegations were *actually* true *and* whether "anything else … happened that was not included in the VICE article,"[746] the latter having impugned the

[744] *Guzman Loera*, 2019 WL 2869081, at *9.

[745] *Ibid.* at *7.

[746] *Ibid.*

"presum[ption] that [the] jurors [obeyed] their oath and conscientiously observe[d] the [court's] instructions and admonitions."[747]

Guzman's approach was reasonable and appropriate. Absent a hearing, district courts must "assume the truth"[748] of competent and substantial juror misconduct evidence like the whistleblower's contemporaneous[749] declarations against interest to a disinterested third-party journalist. By the same token, courts "confronted with credible allegations of prejudicial outside influence" may "not deny" a new trial "without sufficient investigation."[750] Rather, if a defendant "comes forward *at any point in the litigation*" with even a "colorable or plausible juror-misconduct claim," the court has an "unflagging duty" to "investigate."[751] Again, the "remedy for allegations of juror partiality"

---

[747] *Ibid.* at *9 (citations and internal quotation marks omitted).

[748] *Colombo*, 869 F.2d at 151.

[749] *Jordan*, 958 F.3d at 337 (account given "shortly after … events in question" adds to "reliability").

[750] *Ibid.* at 336 (citation and internal quotation marks omitted).

[751] *Tsarnaev*, 968 F.3d at 62 (emphasis supplied) (citations, internal quotation marks and brackets omitted).

stemming from outside influence – *given an adequate threshold showing like this one*[752] – is a "hearing" with prejudice presumed.[753]

If anything, the prejudice presumption resounds more sharply in this case. Though the government professed "confiden[ce]" that "press coverage" wouldn't "undermine" the ability to "select a fair and impartial jury,"[754] the court itself was reticent. With "the world … watching," the court ranked it "critical that prospective jurors be forthcoming about their views" and "any preconceived notions they might have" regarding Guzman.[755] Worrying aloud that "self-censor[ing]" to "avoid stigma from expressing unpopular views" could produce a "partial" jury that would "*undermine the entire trial*," the court thus felt impelled to limit public access to "*voir dire*," ostensibly so "sensitive topics" could be "probed" intensively.[756]

---

[752] *Cf. Guzman Loera*, 2019 WL 2869081, at *5 n.5.

[753] *Smith*, 455 U.S. at 215.

[754] ECF 48 at 8.

[755] A: 413-14.

[756] A: 412.

Yet when the VICE report cast retrospective doubt on the jurors' candor with the court – fogging their impartiality and implicating them in at least mid-trial self-censorship – the court reversed course and walked back the concern it had aired so publicly: that juror dishonesty risked "undermin[ing] the entire trial." The radical about-face stirs a result-oriented impression of revisionism.

It follows that the district court couldn't duck a hearing by presuming the allegations true because we don't know the allegations' – or the underlying misconduct's – full nature and extent: how many jurors are claimed to have violated their instructions; precisely what they read and saw; whether, when and how frequently they discussed it; and exactly who said what to whom. Put more concisely, you can't presume something's true if you don't know what you're presuming.[757] The district

[757] To be clear, the judge didn't and couldn't know what he was "presuming" (*Guzman Loera*, 2019 WL 2869081, at *13) – at least not the full extent of it – because the whistleblower's VICE attributions impaired both the presumption that the jurors followed their instructions (*id.* at *9) and, on a false in one, false in all theory, their veracity in answering questions from the court (*id.* at *8-*9, *10). *Cf. Hyman v. Brown*, 927 F.3d 639, 661-62 (CA2 2019) (law permits "factfinder who identifies falsity in part of a witness's testimony to discredit the whole"). The court's contrary insistence (*Guzman Loera*, 2019 WL 2869081, at *13) was purely circular.

court's alternate suggestion was another logical impossibility. It got things precisely backward, putting the cart before the proverbial horse.

b. The district court vastly exaggerated the showing needed to trigger a posttrial jury misconduct hearing in our Circuit: "clear, strong, substantial and incontrovertible evidence" of specific improprieties, construed simply to mean "reasonable grounds for investigation."[758] While a single stray sentence disclaimed any need for "conclusive" or "irrebuttable" proof,[759] the rest of the court's 45-page opinion essentially demanded just that. [760]

c. By alleging deficiencies in the VICE report and pressing competing hypotheses,[761] the opinion below raised classic credibility

---

[758] *See ante* 162-63. *U.S. v. McCourty*, a case addressing witness perjury, scarcely requires an actual innocence showing to win a new trial for jury misconduct. *Guzman Loera*, 2019 WL 2869081, at *4-*5 & n.5 (citing 562 F.3d 458, 475 (CA2 2009)). To the contrary, jury misconduct involving exposure to extra-record information is *presumptively* prejudicial, regardless of guilt or innocence. *Ante* 167-69, 174 & sources cited. And disqualifying bias is likewise *presumed* when a juror deliberately and materially lies to secure a seat or avoid dismissal. *Id.* 170, 172-73 & sources cited.

[759] *Guzman Loera*, 2019 WL 2869081, at *6 (citations and internal quotation marks omitted).

[760] *Ibid.* at *7, *8-*9, *10-*13.

[761] *Ibid.*; *see also*, *e.g.*, *Guzman Loera*, 2019 WL 2869081, at *9 ("vague"); *id.* at *10 ("not specific enough"); *id.* at *11 (same); *id.* ("general"); *id.* ("conclusory"); *id.* ("vague"); *id.* at *13 (same). Those descriptors are self-serving and unfounded. The VICE account speaks for itself. Reported by a neutral third-party journalist applying

issues that went to weight rather than substance, merely pointing up the need for a hearing. More than that, the court presumed to *resolve* material factual disputes against the defense and in the government's favor,[762] drawing negative inferences, making implicit credibility *determinations* and effectively granting reverse summary judgment without appraising any witness in person. Worse, in rubberstamping the whistleblower's incompetent and inadmissible claims[763] that the child rape allegations didn't change the jurors' minds or hang them up,[764] the court effectively made the jurors "judges of their own impartiality," an impermissible "delegat[ion]" of judicial responsibility.[765]

---

customary professional rigor, it was as extensive and detailed as circumstances allowed, *i.e.*, in the absence of an evidentiary hearing to corroborate, qualify or dispel its knowledgeable source's unnerving accusations. In all events, it was at least as specific and compelling as the proffers dictating hearings in other cases, certainly sufficing to warrant some measure of investigation here.

[762] *See ante* n.760.

[763] *See ante* n.735.

[764] *See Guzman Loera*, 2019 WL 2869081, at *11.

[765] *Tsarnaev*, 968 F.3d at 57-59, 61 (internal quotation marks and brackets omitted omitted); *id.* at 116 (op. of Toruella, J.); *compare Sampson v. U.S.*, 724 F.3d 150, 164 (CA1 2013) (underscoring that "a person who harbors a bias may not appreciate it and, in any event, may be reluctant to admit [t]he[i]r lack of objectivity") *with Guzman Loera*, 2019 WL 2869081, at *12 (blindly crediting tipster's suspect VICE claim, thrown into doubt by other aspects of their account, that "the jurors were honest with me and with the parties during *voir dire* when they responded to our questions about what they knew about defendant").

d. In stressing the court's recurring cautionary instructions, juror inquiries during trial and favorable impressions of the panel's obedience and conscientiousness,[766] the opinion below again resorted to begging the question presented. After all, the whistleblowing juror told VICE that they and their counterparts habitually violated the court's instructions and answered its inquiries dishonestly. That was the whole point of Guzman's retrial motion and hearing request. Try as it might, the court couldn't wish the disputed issue away or paper it over by assuming a preferred conclusion.

Indeed, this Court roundly rejected a similar exercise in pretzel logic[767] just a few years ago. In *U.S. v. Haynes*, defense counsel informed

---

[766] *See Guzman Loera*, 2019 WL 2869081, at *2-*3, *8, *10-*12.

[767] How, for example, could the district court plausibly tax Guzman for phantom evidentiary deficits in a "post-trial record" – basically an invalid demand for conclusive, irrebuttable proof at the *prima facie* stage – that the court itself blocked him from expanding through an evidentiary hearing? *See Guzman Loera*, 2019 WL 2869081, at *7, *9, *13. Only by grossly exaggerating Guzman's *prima facie* evidentiary burden and illicitly substituting the standard – also improperly elevated – for ultimate relief on the merits. *See ante* 179-82, 207-08, 210. And only by artificially deconstructing the article and scrutinizing each of the informer's assertions in isolation rather than considering them in context, as part of a collective whole – a single, organic narrative alleging an overall pattern of misconduct that permeated and compromised Guzman's entire trial. How else to explain the opinion's quixotic efforts to convert the source's vivid and cohesive account – sprinkled with specific episodes recalled in rich and disquieting detail – to "bare statement[s]" that "jurors were exposed to media coverage during the trial" and "an unidentified number

the judge that an alternate juror told the lawyer he'd overheard some women jurors saying "prior to" deliberations that the defendant "'might be guilty, she's here,'" even though the alternate "obviously didn't give any specifics."[768] The judge "responded," much like the government below, that "the jury had been 'continuously advised that if there were any discussions prior to deliberations, that it should be brought to the Court's attention immediately,' and 'no juror brought anything like that to the Court's attention.'"[769] This Court reversed for retrial, partly because the district court "fail[ed] to investigate"[770] the possibility that the jury had "deliberated prematurely in violation of the Judge's instructions," impairing the "presumption of innocence" and committing potential "misconduct."[771]

---

of jurors monitored a journalist's Twitter feed at unidentified times"? *Guzman Loera*, 2019 WL 2869081, at *9-*10.

[768] 729 F.3d 178, 186-87 (CA2 2013) (citation omitted).

[769] *Ibid.* at 187 (citation and alterations omitted).

[770] *Ibid.* at 183, 197; *see also ibid.* at 187, 191-92.

[771] *Ibid.* at 191-92 ("Where the District Court instructs the jury to refrain from premature deliberations, as the Court did in this case, and the jury nevertheless discusses the case prior to the close of trial, that premature deliberation may constitute jury misconduct.") (citing *Cox*, 324 F.3d at 86).

More recently – only a couple months back – a district court in another case "surround[ed]" by massive "publicity" convened a post-trial evidentiary hearing to explore allegations of juror dishonesty suggesting potential bias.[772] Among the allegations were "claims that the foreperson had shared outside information about the case with other jurors during the trial in violation of court orders."[773]

Famously linked to Pres. Trump as an ally and a reputed political operative, Roger Stone was convicted on what the court – like Judge Cogan here – called "overwhelming" and "undisputed" evidence, including "defendant's own texts and emails."[774] And Stone's preliminary misconduct "showing" was markedly "weak[er]" than the in-depth VICE expose circulated around the world.[775]

---

[772] *Stone*, 2020 WL 1892360, at *2, *7.

[773] Roger Stone Judge Won't Step Aside for Sentencing Remarks, https://www.law360.com/whitecollar/articles/1246603/roger-stone-judge-won-t-step-aside-for-sentencing-remarks?nl_pk=e25f3d2f-6730-4dbb-b81c-a367e4ea1e63&utm_source=newsletter&utm_medium=email&utm_campaign=whitecollar?copied=1 (2/24/20) (as visited 8/12/20).

[774] *Ante* n.772 at *2, *40 n.63 (citation and internal quotation marks omitted).

[775] *Ibid.* at *25; *accord id.* at *3-*4, *6 ("questionable whether [Stone] had come forward with enough evidence to warrant a hearing"), *32, *39 ("bald assertions of misconduct" with "no [supporting] facts").

Yet "given the unique circumstances" – the case's high-profile nature, the risk that jurors might have "received" advance "information" or formed preconceived "opinions" about it, and to make sure no pall was cast over a closely watched prosecution – the court held a hearing in "an abundance of caution" *despite* those perceived hardships.[776] Emphasizing that "juror impartiality" determinations "frequently turn on" testimony from the "juror[s] in question," the court took evidence from three jurors in person and let both sides examine them.[777] In the end, it dubbed the hearing "clarifying."[778] The appearance of institutional integrity – and public confidence in the perception of impartial justice – demanded no less in this equally celebrated case.

Similarly, in a ruling since affirmed by New York's highest court, a state appeals panel reversed a murder conviction after a "thorough" trial court "hearing" established that a juror "failed to follow the court's instructions concerning communicating with outside parties about the case prior to rendering a verdict [(1)] by sending and receiving text

---

[776] *Ibid.* at *6, *17, *39; *ante* n.773.

[777] *Stone*, 2020 WL 1892360, at *6, *17-*18, *21, *28 (citation omitted).

[778] *Ibid.* at *6.

messages regarding the trial and the events surrounding it, and [(2)] by *misrepresenting her actions when questioned about them*."[779] Prompting the hearing? Nothing more than "a discharged alternate juror['s] report[ing] to defense counsel" after the verdict that the offending juror "had engaged in prohibited communications during the trial"[780] – a proffer far more "vague and "conclusory"[781] than the detailed (especially by comparison) VICE report.

F. CONCLUSION

Immediately after the verdict in one of the most publicized cases ever, a juror came forward to a disinterested journalist and implicated themselves and their counterparts in the gravest misconduct: rampantly violating their oath and instructions by pervasively seeking out incendiary press coverage – including inadmissible allegations that the defendant drugged and raped young girls – and actively colluding to cover it up by lying to the court's face when confronted about it. The source's accusations, if true, effectively tarred the offending jurors with criminal

[779] *Neulander*, 80 N.Y.S.3d at 798 (dissenting op.) (emphasis supplied).

[780] *Ibid.* at 795 (maj. op.).

[781] *Ante* n.761.

activity of their own, rendering them patently unfit to serve and demanding their disqualification or a mistrial declaration. If those self-inculpatory statements against interest, reduced to a published report for the whole world to read and know, don't provide reasonable grounds to investigate,[782] it's hard to imagine that anything would.

Given the VICE allegations' "plainly prejudicial nature,"[783] Guzman deserves a remand for an evidentiary hearing and potential retrial. At a minimum, the district court couldn't properly deny relief summarily – at least not without creating a pernicious aura of unfairness whose ripples will long outlast and far surpass this transient case. Parroting ad nauseam the magic words "fishing expedition"[784] doesn't make it so – no matter the defendant's identity. The identity doesn't absolve the unseemly behavior or excuse the nagging lack of inquiry. Not with jurors accused of brazenly lying to the court when quizzed on their reported misconduct, vindicating yet again the lesson of Watergate and so many other scandals: the coverup is worse than the crime. If there's no

[782] *See ante* n.588.

[783] *Johnson*, 954 F.3d at 180.

[784] *Guzman Loera*, 2019 WL 2869081, at *6-*7, *9, *17.

procedural justice for Chapo Guzman and the reputed worst among us, there can be none for our best – or for anybody.

POINT X

THE COURT SHOULD REMAND THIS MATTER FOR A HEARING, BEFORE A DIFFERENT DISTRICT JUDGE, TO INVESTIGATE INFORMATION APPEARING TO IMPLICATE THE GOVERNMENT AND TRIAL COURT IN IMPROPER *EX PARTE* COMMUNICATIONS, AN UNDISCLOSED SHADOW COUNSEL ARRANGEMENT AND CONDUCTING PRIVATE JUDICIAL PROCEEDINGS WITH GUZMAN ABSENT HIS COUNSEL OF RECORD

A sequence of apparent irregularities in the proceedings below has come to the attention of Guzman's appellate counsel.

On information and belief, the government in 2018 engaged in discussions with a lawyer purporting to act for Guzman – though never entering an appearance on his behalf – regarding potential disposition. The district court subsequently conducted a videoconference concerning potential disposition with at least a prosecutor, Guzman and yet another attorney the court appointed to represent him – but without the presence of Guzman's counsel of record. To the author's knowledge, there is no public record of the videoconference. On further information and belief,

the events just described occurred without notice to record defense counsel – and without their knowledge.

The circumstances outlined in the last paragraph raise several fraught concerns:

A. It seems anomalous for a prosecutor to discuss disposition of a represented defendant's case with a third-party lawyer who hasn't entered an appearance – especially without notifying counsel of record.

1. At best, such conversations threaten to interfere with and undermine the attorney-client relationship, breeding Sixth Amendment issues.

2. At worst, the third-party lawyer may have shared confidential defense strategy or other sensitive if not privileged information with the government, posing "spy in the camp"[785] and taint[786] problems.

[785] *See Weatherford v. Bursey*, 429 U.S. 545, 547 (1977).

[786] *See Kastigar v. U.S.*, 406 U.S. 441 (1972).

B. The videoconference seems to have arisen from *ex parte* government communications with the court, creating at least an appearance of impropriety.

C. Holding a private hearing with the prosecutor and defendant regarding possible disposition – without record defense counsels' presence or knowledge – likewise creates a potentially disqualifying appearance of judicial impropriety.[787]

1. That's particularly true where the court covertly appoints "shadow counsel" to represent the defendant in record counsels' absence,[788] further impairing the attorney-client relationship.

Given the nettlesome revelations in play, this Court should order a remand for factual inquiry per Fed. R. Crim. P. 33 or 28 U.S.C. § 2255, retaining jurisdiction.[789] To the extent record counsel may have learned of the private hearing afterward and failed to seek appropriate relief, Guzman – facing life in prison – shouldn't have to spend his only § 2255

---

[787] *See* 28 U.S.C. § 455(a).

[788] *See People v. Stewart*, 656 N.Y.S.2d 210, 227-28 (N.Y. App. Div. 1 1997) (Murphy, P.J., dissenting), *app. dism'd*, 91 N.Y.2d 900, 691 N.E.2d 1024 (N.Y. 1998).

[789] *E.g.*, *U.S. v. Rodriguez*, 531 F. App'x 148, 149-50 (CA2 2013) (citing *Brown*, 623 F.3d at 112-15; *U.S. v. Levy,* 377 F.3d 259, 266 (CA2 2004); *U.S. v. Leone,* 215 F.3d 253, 257 (CA2 2000)).

motion pursuing an issue that could've been raised and resolved below.[790] Because the issue implicates the district court's conduct and makes it a potential witness, a different judge[791] should handle the proceedings on remand.[792]

[790] *E.g.*, *Leone*, 215 F.3d at 257; *cf. Brown*, 623 F.3d at 113.

[791] *E.g.*, *U.S. v. Langston*, 720 F. App'x 652, 653 (CA2 2018); *U.S. v. Dijbo*, 730 F. App'x 52, 61 (CA2 2017); *U.S. v. Johnson*, 850 F.3d 515, 525 (CA2 2017).

[792] Four days before this brief's deadline, on the night of Aug. 31, the government made a post-trial *Brady* disclosure potentially implicating a key witness in pretrial, post-cooperation criminal activity – hitherto undisclosed – while incarcerated at the MCC. The government reported that it's still investigating this information and will update Guzman and the district court as it learns more. Depending on what the investigation uncovers, the information may require a later motion to remand so Guzman can seek a new trial under Fed. R. Crim. P. 33(a)-(b)(1).

CONCLUSION

This Court should reverse Guzman's conviction or remand the case as appropriate.

Dated: Brooklyn, NY
Sept. 4, 2020

Respectfully submitted,

By: _____

MARC FERNICH, ESQ.
LAW OFFICE OF MARC FERNICH
800 Third Ave.
Fl. 18
NY, NY 10022
(212) 446-2346
maf@fernichlaw.com

Counsel for Joaquin Guzman Loera

CERTIFICATE OF COMPLIANCE

MARC FERNICH, an attorney admitted to practice in this Court, certifies per Fed. R. App. P. 32(a)(7) that, according to the word count feature on Microsoft Word 365, this brief contains 48,383 words of proportionately-spaced Century 14- and 12-point typeface.

Dated: New York, NY
Sept. 4, 2020

/s/
MARC FERNICH