

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 16-20519-CR-LENARD

UNITED STATES OF AMERICA,

v.

JAMES PETER SABATINO,

Defendant.

**ORDER DENYING MOTION TO MODIFY COMMUNICATION
RESTRICTIONS IMPOSED BY THE COURT'S ORDER AS IT RELATES TO
SOCIAL CONTACT GERALD J. CALEGAN (D.E. 577)**

THIS CAUSE is before the Court on Defendant James Peter Sabatino's Motion to Modify Communications Restrictions Imposed by the Court's Order Imposing Restrictions on Defendant's Communications Pursuant to 18 U.S.C. § 3582(e),¹ as it Relates to Social Contact Gerald J. Calegan. ("Motion," D.E. 577.) The Government filed a Response on April 9, 2020, ("Response," D.E. 578), to which Defendant filed a Reply on April 16, 2020, ("Reply," D.E. 579). Upon review of the Motion, Response, Reply, and the record, the Court finds as follows.

I. Background

On September 1, 2017, Defendant pled guilty pursuant to a written Plea Agreement (D.E. 230) to Count 1 of a Superseding Information (D.E. 214) which charged Defendant

¹ At the time the Court imposed the communication restrictions, the relevant statutory provision was 18 U.S.C. § 3582(d) (2015). The provision was later recodified at 18 U.S.C. § 3582(e). For simplicity and clarity, the Court will refer only to the current, recodified provision.

and others with Conspiracy to Violate the Racketeer Influenced and Corrupt Organizations (“RICO”) Act, 18 U.S.C. § 1962(d). (See Tr. of Change of Plea Hr’g, D.E. 298.) In connection with the Plea Agreement, Defendant and the Government executed a Stipulated Factual Proffer in which Defendant admitted to being a member of a prison-based criminal organization (the “Enterprise”) engaged in a variety of criminal activities while being incarcerated at the Federal Detention Center in Miami, Florida (“FDC Miami”). (D.E. 231 ¶¶ 3, 5(b), 6.) Defendant, who is known by law enforcement to be an associate of the Gambino Organized Crime Family of La Cosa Nostra, (id. ¶ 6), was the sole organizer and leader of the Enterprise. (Id. ¶ 5(a).)

According to the Factual Proffer, soon after arriving at FDC Miami in October 2014, Defendant successfully obtained a cellular telephone through a federal correctional officer. (Id. ¶¶ 6-7.) While incarcerated, Defendant and other members of the Enterprise conducted regular meetings in person, telephonically, and by other means of communication during which they discussed, planned, and otherwise engaged in criminal activity, including fraud, interstate trafficking of stolen property, introduction of contraband into federal prisons, bribery, obstruction of justice, witness intimidation, and murder. (Id. ¶ 5(b).) Defendant used the contraband cellphone to defraud several luxury stores out of millions of dollars in luxury goods. (Id. ¶¶ 8-32.) Defendant gave a percentage of all fraud proceeds generated by the Enterprise to an associate of the Gambino Organized Crime Family of La Cosa Nostra. (Id. ¶ 5(h).)

The Plea Agreement included a provision in which the Government agreed to request, pursuant to 28 C.F.R. § 501.3, that the Bureau of Prisons (“BOP”) impose Special

Administrative Measures (“SAMs”). (D.E. 230 ¶ 7(b)). Title 28, Code of Federal Regulations, section 501.3 permits BOP, upon direction of the Attorney General, to “authorize the Warden to implement special administrative measures that are reasonably necessary to protect persons against the risk of death or serious bodily injury.” 28 C.F.R. § 501.3(a). “These procedures may be implemented upon written notification to the Director, Bureau of Prisons, by the Attorney General . . . that there is a substantial risk that a prisoner’s communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons.” 28 C.F.R. § 501.3(a). In the Plea Agreement, the Government agreed to request

communications restrictions, which are intended to prevent violence and/or physical harm to other persons. Specifically, this Office will request that BOP restrict the defendant’s communications to non-legally privileged telephone calls and correspondence with his step-mother, Carol Fardette and others approved by this Office. In addition, this Office will seek SAM restrictions that permit the defendant to communicate with undersigned defense counsel [Joseph Rosenbaum] and his staff[.] This office shall also request the defendant be restricted from communicating with other inmates during the term of his imprisonment.

(D.E. 230 ¶ 7(b).) The Government agreed to “continue to request imposition by BOP of SAM restrictions and that said restrictions be renewed every year and enforced until such time as the defendant unequivocally demonstrates that he will not threaten or do violence and/or physical harm to other persons[.]” (Id. ¶ 7(c).)

Separate and apart from the SAMs, the Government also agreed to request that the Court impose conditions of imprisonment restricting Defendant's communications pursuant to 18 U.S.C. § 3582(e).² (See id. ¶ 7(d).) That statute provides:

The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 (racketeering) or 96 (racketeer influenced and corrupt organizations) of this title or in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

18 U.S.C. § 3582(e). In the Plea Agreement, the Government agreed to file a motion requesting that the Court's sentence include that: (1) Defendant be confined so that he has no contact with other prisoners; and (2) Defendant's communication be restricted from all persons inside and outside of prison except for Carol Fardette, defense counsel Joseph Rosenbaum, and Mr. Rosenbaum's then-paralegal (now-associate attorney) Kimberly Acevedo. (D.E. 230 ¶ 7(d).) The Plea Agreement provides that "[t]hese restrictions shall remain until such time as when the Defendant demonstrates his communications no longer pose a threat." (Id.)

The Parties also executed a Stipulated Letter of Understanding which outlined the communications restrictions and emphasized that Defendant's guilty plea was contingent upon the Attorney General authorizing the SAMs. (D.E. 232.)

² See supra Note 1.

On September 1, 2017, the Court held a Change of Plea Hearing during which Defendant pled guilty. (See Tr. of Change of Plea Hr'g, D.E. 298 at 28:1 – 29:8.) At that hearing, Defendant made clear that the SAMs were very important to his decision to plead guilty. (Id. at 28:1 – 29:8; 33:2 – 37:3, 44:1-6.) The Court reviewed with Defendant the SAMs outlined in the Stipulated Letter of Understanding, (id. at 39:25 – 41:6); Defendant agreed that he had read the Stipulated Letter of Understanding, fully discussed it with his attorney, understood all of its terms, and signed it, (id. at 42:6-17). Eleven days after the Change of Plea Hearing, the Attorney General granted the Government's request and authorized the SAMs based on the substantial risk that Defendant's communications or contacts with other persons could result in death or serious bodily injury. (See D.E. 269 at 3.)

The Court also reviewed with Defendant at the Change of Plea Hearing the Parties' Plea Agreement, including the Section 3582(e) communication restrictions:

[THE COURT]: D) The government agrees to file, prior to sentencing, a motion under Title 18, United States Code, Section 3582([e]) requesting imposition of certain conditions of imprisonment including the following:

One, you should be confined during your time of incarceration so that you have no contact with other prisoners.

Two, your communication is restricted from all persons inside and outside of prison except for.

(A) Your stepmother, Carol Ferdette [sic].

(B) Joe Rosenbaum, your attorney and,

(C) Kimberly Acevedo, your paralegal.

Three, these restrictions shall remain until such time, as when you demonstrate your communications no longer pose a threat.

(D.E. 298 at 49:1-14.) Defendant acknowledged that he signed the Plea Agreement, read it before signing it, fully discussed it with his attorney before signing it, and understood all of its terms before signing it. (Id. at 57:2-14.) The Court then asked:

Q. [THE COURT] The terms that I summarized to you, are those the terms of your plea agreement with the government as you understand them?

A. Yes.

(Id. at 59:12-14.) After further colloquy, the Court found that Defendant was “fully competent and capable of entering an informed plea, that the defendant is aware of the nature of the charge and the consequences of the plea, and that the plea of guilty is a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of the offense.” (Id. at 61:8-13.) The Court therefore accepted the plea and adjudicated Defendant guilty of Count One. (Id. at 61:13-15.)

On November 13, 2017, the Government filed an Agreed-Upon Motion Requesting Imposition of Communication Restrictions Pursuant to 18 U.S.C. § 3582(e). (“Agreed-Upon Motion,” D.E. 269.) Specifically, the Motion requests the following conditions of confinement be imposed at sentencing and reflected in the Judgment:

1. Defendant should be confined, within the U.S. Marshals Service/BOP/detention facility’s reasonable efforts and existing confinement conditions, so that he has no contact with other prisoners;
2. Defendant should be limited, within the U.S. Marshals Service/BOP/detention facility’s reasonable efforts and existing confinement conditions, from having contact (including passing or receiving any oral, written, or recorded communications) with any other inmate, visitor, attorney, or anyone else, that could reasonably foreseeably result in the

inmate communicating (sending or receiving) information that could allow the inmate to circumvent the Court's intent of significantly limiting the inmate's ability to control, manage, direct, finance, or otherwise participate in an illegal enterprise;

3. That the restrictions specified above should permit Defendant's contacts and communications with the following persons:

- a. Carol Fardette, Defendant's step-mother;
- b. Joseph S. Rosenbaum, Counsel for Defendant; and
- c. Kimberly Acevedo, Paralegal to Counsel for Defendant.

4. The government further requests that these restrictions remain in place until Defendant demonstrates his communications no longer pose a threat, and that the Court retain jurisdiction to consider any applications to modify these special conditions of confinement. . . .

(Id. at 10.) The Motion states that in addition to running the criminal enterprise from FDC Miami between 2015 and 2017, Defendant also operated a criminal enterprise while incarcerated in the State of New York in 2002. (Id. at 8-9.) Thus, the Parties

agree[d] that these restrictions, although severe, are appropriate given Defendant's history and propensity for recruiting co-conspirators through fellow inmates, corrections officers, and persons who are not incarcerated. As noted, the purpose of the proposed restrictions is to prevent Defendant from continuing his illegal activities from his place of confinement; the proposed, agreed-upon restrictions are reasonably formulated to accomplish this objective.

(Id. at 9 (citing United States v. Felipe, 148 F.3d 101, 110 (2d Cir. 1998)).) Defense counsel also agreed with the communication restrictions. (Id. at 11.)

On November 13, 2017, Defendant appeared before the Court for Sentencing. (See Sentencing Hr'g Tr., D.E. 337.) At the beginning of the hearing, the Court granted the Agreed-Upon Motion. (Id. at 5:25 – 5.) The Court ultimately sentenced Defendant to 240 months' imprisonment, consecutive to any undischarged term of imprisonment in case

numbers 98-6147-Cr-Scola, 99-114-Cr-Scola, 13-60040-TP Scola, and State cases F14-587, F-413263, F13-22901, and F13-22899. (Id. at 26:1-14.) The Court further ordered

that the defendant shall be confined within the United States Marshal Service BOP detention facilities reasonable efforts and existing confining conditions so that he has no contact with other prisoners.

The defendant shall be limited within the United States Marshal Service BOP detention facilities reasonable efforts and existing confining conditions from having contact including passing or receiving of any oral, written, or reported communications with any other inmate, visitor, attorney, or anyone else that could reasonably foreseeably result in the defendant communicating, including sending or receiving information that could allow the defendant to circumvent the Court's intent of significantly limiting the defendant's ability to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

The defendant is permitted contact and communications with the following persons: Carlo [sic] Fardette, F-A-R-D-E-T-T-E, the defendant's stepmother; Joseph Rosenbaum, his attorney; Kimberly Acevedo, paralegal to counsel for the defendant. . . .

These restrictions shall remain in place until such time as the defendant demonstrates his communications no longer pose any kind of threat, and the Court shall retain jurisdiction to consider any applications to modify these special conditions of confinement.

(Id. at 31:22 – 33:2.)

On November 20, 2017 the Court entered a written Order Granting the Government's Agreed-Upon Motion. (D.E. 286.) Relevant here, the Court found that "that there is probable cause to believe that Defendant's association or communication with persons other than his step-mother, his attorneys, or the attorney's staff would enable Defendant to "control, manage, direct, finance, or otherwise participate in an illegal enterprise." (Id. at 5 (quoting 18 U.S.C. § 3582(e)).) The Order states that:

b. Defendant should be limited, within the U.S. Marshals Service/BOP/detention facility's reasonable efforts and existing confinement conditions, from having contact (including passing or receiving any oral, written, or recorded communications) with any other inmate, visitor, attorney, or anyone else, that could reasonably foreseeably result in Defendant communicating (sending or receiving) information that could allow Defendant to circumvent the Court's intent of significantly limiting Defendant's ability to control, manage, direct, finance, or otherwise participate in an illegal enterprise;

c. The restrictions specified above should permit Defendant's contacts and communications with the following persons:

- i. Carol Fardette, Defendant's step-mother;
- ii. Joseph S. Rosenbaum, Esq., Counsel for Defendant; and
- iii. Kimberly Acevedo, Esq., Co-Counsel for Defendant; and

d. The restrictions specified above shall remain in place until Defendant demonstrates his communications no longer pose a threat.

(Id. at 8-9.) The Court retained jurisdiction "to consider any applications made by Defendant, Defendant's attorneys, or the Government to modify these special conditions of confinement." (Id. at 9.)

On December 7, 2017, the Court entered an Amended Judgment which reflects the Court's oral pronouncement of sentence, including the agreed-upon communications restrictions, and that "[t]he Court shall retain jurisdiction to consider any applications by the Defendant, the Defendant's counsel, or the Government, to modify these special conditions of confinement." (Id. at 3.)

Since then, Defendant has filed many pro se motions and letters requesting enforcement of, modifications to, or information about the agreed-upon communications restrictions. (D.E. 394, 395, 396, 397, 400, 401, 402, 403, 404, 407, 408, 409, 415, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442,

443, 444, 445, 446, 452, 453, 455, 458, 461, 462, 463, 464, 465, 466, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 493, 474, 495, 496, 499, 501, 502, 503, 504, 510, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 526, 527, 528, 529, 530, 531, 532, 536, 541, 545, 546, 549, 551.) Relevant here, on May 22, 2018, Defendant filed a pro se Motion to Correct 3582(e) Communication Restriction and Enforce Plea Agreement. (D.E. 385.) On May 24, 2018, the Court entered an Order Striking that Motion pursuant to the Local Rules which provide that a party represented by counsel may not file pro se Motions. (D.E. 398.) On July 2, 2018, Defendant filed a Notice of Appeal of the Court's Order striking his Motion, (D.E. 410), and a Motion to Appoint Counsel for Purposes of Appeal, (D.E. 411). The Court granted the Motion to Appoint Counsel for Purposes of Appeal, and ultimately appointed attorney Ivy R. Ginsberg to represent Defendant on his appeal pursuant to the Criminal Justice Act, (D.E. 420). Defendant later voluntarily dismissed the appeal. See United States v. Sabatino, Case No. 18-12846 (11th Cir. Apr. 1, 2019).

On November 26, 2018, Defendant, through appellate counsel Ivy R. Ginsberg, filed a Motion to Appoint Ms. Ginsberg as CJA Counsel for Further Representation in the District Court as Needed. (D.E. 525.) The Court permitted Defendant to file a Response to that Motion. (D.E. 534.) In his Response, Defendant requested to be represented by both Mr. Rosenbaum and Ms. Ginsberg in the district court. (D.E. 541.) On January 4, 2019, the Court entered an Order denying the Motion to Appoint Ms. Ginsberg as CJA Counsel in the District Court, finding that Defendant did not need two court-appointed attorneys in the district court. (D.E. 542.) The Court ordered Mr. Rosenbaum to continue to represent Defendant in the district court, and Ms. Ginsberg to continue to represent

Defendant in the court of appeals. (Id.) On February 12, 2019, Defendant filed a pro se Motion for Reconsideration, requesting that the Court substitute Ms. Ginsberg for Mr. Rosenbaum in the district court. (D.E. 546.) The Court granted that motion, appointed Ms. Ginsberg to represent Defendant in the district court, and terminated Mr. Rosenbaum as counsel of record. (D.E. 547.)

On May 6, 2019, Defendant, through Ms. Ginsberg, filed a Motion to Authorize Communications with Attorneys Joe Rosenbaum and Kimberly Acevedo. (D.E. 551.) On July 10, 2019, the Court entered an Order denying that Motion. (D.E. 559.) On July 17, 2019, Defendant filed a Notice of Appeal of the Court's July 10, 2019 Order denying Defendant's request to authorize communications with Mr. Rosenbaum and Ms. Acevedo. (D.E. 560.)

On November 5, 2019, Ms. Ginsberg filed a Motion to Withdraw as Attorney and to Appoint Joseph Rosenbaum as CJA Counsel. (D.E. 572.) Ms. Ginsberg sought to withdraw because she had accepted a full-time position with the Florida Office of the Attorney General Criminal Appeals Division. (Id. at 1.) The Court granted the Motion to Withdraw, reappointed Mr. Rosenbaum as CJA Counsel in the district court, and authorized Mr. Rosenbaum and Ms. Acevedo to communicate with Defendant. (D.E. 573.) However, Defendant did not withdraw his appeal of the Court's order denying his prior request to authorize communications with Mr. Rosenbaum and Ms. Acevedo. See United States v. Sabatino, Case No. 19-12916 (11th Cir.). That appeal remains pending.

On March 27, 2020, Defendant, through counsel, filed the instant Motion to Modify Communication Restrictions Imposed by the Court's Order as it Relates to Social Contact Gerald J. Calegan. (D.E. 577.)

II. Discussion

Defendant seeks to add Mr. Gerald Calegan to his list of approved social contacts. (Mot. ¶ 7.) According to the Motion, Mr. Calegan is Carol Fardette's fiancée, (id.); Ms. Fardette is Defendant's step-mother and is currently Defendant's only approved social contact under the communications restrictions imposed by the Court's Amended Judgment pursuant to 18 U.S.C. § 3582(e), (see D.E 306 at 3). According to the Motion, Ms. Fardette is elderly and is concerned that "should something happen to her, [Defendant] will have no social contact." (Id. ¶¶ 8, 10.) Defendant alleges that he "has requested to add Mr. Calegan since last year, when Ms. Fardette was hospitalized and Mr. Calegan had no way of communicating with [Defendant] regarding Ms. Fardette's health condition." (Id. ¶ 9.) However, Defendant does not cite to any prior motion to allow communications with Mr. Calegan, and the Court's review of the record does not reveal one. The Motion further asserts:

11. The FBI has conducted a background check on Mr. Calegan and it is undersigned counsel's understanding that there were no findings that would preclude Mr. Calegan from being added the list of individuals authorized to communicate with SABATINO.

12. The Bureau of Prisons ("BOP") normally takes no position on whether new contacts are added for inmates with communication restrictions pursuant to 18 U.S.C. § 3582 and/or SAMs. However, BOP regulations generally promote or encourage contact between inmates and their friends and families. See generally 28 CFR 540.10, 540.40, and 540.100.

13. It is SABATINO's understanding that he is the only inmate in BOP custody restricted to just one social contact.

14. ADX Florence, Colorado maintains a neutral position with regard to the request to add Mr. Calegan.

(Id. ¶¶ 11-14.) Defendant does not attach any evidence regarding the FBI's background check or ADX Florence's "neutral position" on the request. (Id. ¶ 17.) However, the Motion asserts that "allowing [Defendant] to communicate with Mr. Calegan presents no threat of criminal activity. If the Government were to take a contrary position, SABATINO respectfully requests an evidentiary hearing." (Id. ¶ 17.)

The Government argues that the Court lacks jurisdiction to consider the Motion because the case is currently on appeal. (Resp. at 1.) The Government asserts that "[r]uling on Sabatino's opposed Motion while this case is on appeal would be especially problematic" because "[i]n the Court of Appeals, Sabatino is challenging this Court's authority to modify the communications order at issue here." (Id. at 1 (citing Appellate Reply Brief (D.E. 578-1) at 15.) It argues that Defendant's Motion is disingenuous because he is arguing on appeal that the Court may not modify the Section 3582(e) communications restrictions without a motion from the Government. (Id. at 2.) The Government further argues that even if the Court had jurisdiction, the Motion should be denied because "Sabatino does not say why he needs to communicate with a 'social contact' (Calegan) he has never met. Nor does Sabatino's Motion acknowledge that his various letters and other communications continue to be seized, pursuant to the communications restrictions, because they discuss his purported terrorist affiliations and criminal activity." (Id. at 2-3.)

In his Reply, Defendant argues that the Court retained jurisdiction to modify the communications restrictions in its Order Granting the Government's Agreed-Upon Motion. (Reply at 1-2.) He argues that Defendant's current appeal does not divest the Court of jurisdiction over modifications. (Id. at 2.) He argues that the issue on appeal is whether the Court may sua sponte modify the communication restrictions, and asserts that the Court may modify the restrictions upon motion by Defendant, the Government, or BOP. (Id.) Finally, he argues that Ms. Fardette's "advanced" age is good reason to modify the restrictions to permit communications with Mr. Calegan. (Id. at 3.)

As an initial matter, the Court finds that it has jurisdiction to modify the Section 3582(e) communication restrictions upon Defendant's Motion. The statute provides:

The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 (racketeering) or 96 (racketeer influenced and corrupt organizations) of this title or in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

18 U.S.C. § 3582(e). Prior to sentencing, the Government filed an Agreed-Upon Motion Requesting Imposition of Communication Restrictions Pursuant to 18 U.S.C. § 3582(e), (D.E. 269), which the Court orally granted at Defendant's Sentencing Hearing, (see Tr. of Sentencing Hr'g, D.E. 337 at 5:25-5), and later granted by written Order, (D.E. 286). In the written Order, the Court explicitly retained jurisdiction "to consider any applications made by Defendant, Defendant's attorneys, or the Government to modify these special

conditions of confinement.” (Id. at 9.) The communication restrictions are also reflected in the Amended Judgment in which the Court explicitly retains jurisdiction “to consider any applications by the Defendant, the Defendant’s counsel, or the Government, to modify these special conditions of confinement.” (D.E. 306 at 3.) Although Section 3582(e) provides that the sentencing court may only impose a restriction “that requires that the defendant not associate or communicate with a specified person” upon motion by the Director of BOP or the Government, Defendant’s Motion does not seek an Order restricting him from communicating with a specified person. To the contrary, he seeks an order permitting him to communicate with a specified person. (Mot. at 2.) Therefore, Section 3582(e) does not prohibit the relief sought.

Nor does Defendant’s current appeal deprive the Court of jurisdiction to consider the Motion. “As a general matter, the filing of a notice of appeal deprives the district court of jurisdiction over all issues involved in the appeal.” Mahone v. Ray, 326 F.3d 1176, 1179 (11th Cir. 2003) (citing Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982); Doe v. Bush, 261 F.3d 1037, 1064 (11th Cir. 2001)). “However, it does not prevent the district court from taking action ‘in furtherance of the appeal.’” Id. (quoting Lairsey v. Advance Abrasives Co., 542 F.3d 928, 930 (5th Cir. 1976)).³ “Nor does it prevent the court from entertaining motions on matters collateral to those at issue on appeal.” Id.

³ In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit before October 1, 1981.

(citing Doe, 261 F.3d at 1064) (citing Weaver v. Fla. Power & Light Co., 172 F.3d 771, 773 (11th Cir. 1999)).

Here, the only appeal Defendant currently has pending before the Eleventh Circuit challenges this Court's Order of July 10, 2019, denying his Motion to Authorize Communication with attorneys Joseph Rosenbaum and Kimberly Acevedo. See United States v. Sabatino, Case No. 19-12916 (11th Cir. filed July 26, 2019). That Motion requested permission to communicate with Rosenbaum and Acevedo as-needed regarding Case Nos. 98-6147-Cr-Scola, 99-0114-Cr-Scola, and 13-60040-TP-Scola. (D.E. 551 at 3.)

The Court denied the Motion, observing:

All three cases cited in Defendant's motion are closed. Judge Scola has denied motions to appoint counsel in all three cases. In two of the cases, 98-06147-CR-Scola, and 99-00114-CR-Scola, the Defendant's appeal of Judge Scola's orders denying appointment of counsel have been dismissed by the 11th Circuit. In 13-60040-TP-Scola the last entry by Judge Scola was in 2018. No appeal was filed.

(D.E. 559.) Defendant has appealed that Order, arguing that: (1) the Court was without authority to sua sponte impose a communication restriction on Defendant as to Mr. Rosenbaum and Ms. Acevedo; and (2) the restriction violated Defendant's constitutional rights to consult with his attorney, access to the courts, and free speech. United States v. Sabatino, Case No. 19-12916, Appellant's Br., (11th Cir. Nov. 14, 2019).

The Court finds that the issue currently before the Court—that is, whether the Section 3582(e) communication restrictions should be modified to permit Defendant to communicate with Mr. Calegan—is collateral to the issue currently on appeal before the Eleventh Circuit—that is, whether this Court had authority to restrict Defendant from

communicating with Mr. Rosenbaum and Ms. Acevedo. Therefore, the Court may address the merits of Defendant's Motion. See Mahone, 326 F.3d at 1179.

The Court finds that Defendant's communication restrictions should not be modified to include contact with Mr. Calegan at this time. Defendant is known by law enforcement to be an associate of the Gambino Organized Crime Family of La Cosa Nostra. (Factual Proffer ¶ 6.) He is currently incarcerated in a high-security federal prison after pleading guilty to conspiring to racketeer from prison. (See Tr. of Change of Plea Hr'g, D.E. 298.) Defendant admitted that while he was incarcerated at the Federal Detention Center in Miami between 2015 and 2017, he was the sole organizer and leader of a prison-based criminal Enterprise which conducted regular meetings in person, telephonically, and by other means of communication during which they discussed, planned, and otherwise engaged in criminal activity, including fraud, interstate trafficking of stolen property, introduction of contraband into federal prisons, bribery, obstruction of justice, witness intimidation, and murder. (Factual Proffer ¶ 5(b).) Defendant used a contraband cellphone to defraud several luxury stores out of millions of dollars in luxury goods. (Id. ¶¶ 8-32.) Defendant gave a percentage of all fraud proceeds generated by the Enterprise to an associate of the Gambino Organized Crime Family of La Cosa Nostra. (Id. ¶ 5(h).) The Enterprise recruited persons outside prison to commit crimes to further the objectives of the Enterprise. (Id. ¶ 12.)

This was not the first time that Defendant had operated a criminal enterprise while incarcerated. In 2002—while incarcerated in New York following convictions for threatening to kill a federal prosecutor and assaulting a federal correctional officer—

Defendant ran a similar scheme to defraud businesses, recruiting a network of co-conspirators, and coercing and threatening these accomplices when they refused to carry out his orders. (See Agreed-Upon Motion ¶ 15; PSR ¶ 121.) Defendant committed the fraudulent conduct using the Westchester County Jail’s telephone. (PSR ¶ 121.) Typically, he would call someone outside the prison, persuade them to forward his call to a company that provided goods and services, pretend to be a corporate executive (of, for example, Sony Pictures or Nextel Communications), order goods and/or services, and never pay for them. (Id.) Then, someone outside the prison would receive the goods, resell them, and distribute proceeds as Defendant directed. (Id.) Defendant paid fraud proceeds from the 2002 scheme to the same co-conspirator who received stolen goods as a result of Defendant’s 2015 crimes. (Agreed-Upon Motion ¶ 15.)

Consequently, the Parties agreed that Section 3582(e) communications restrictions were necessary and appropriate. (See Plea Agreement (D.E. 230) ¶ 7(d); Stipulated Letter of Understanding (D.E. 232) ¶ 3; Agreed-Upon Motion (D.E. 269) ¶¶ 3, 14-17.) In fact, as part of his agreement to plead guilty, Defendant insisted upon Section 3582(e) communication restrictions preventing him “from communicating with anyone other than his step-mother, Carol Fardette, . . . Joseph S. Rosenbaum, and . . . Kimberly Acevedo.” (See Stipulated Letter of Understanding, D.E. 232.) Defendant agreed to being restricted from communicating with anyone that “could reasonably foreseeably result in the inmate communicating (sending or receiving) information that could allow the inmate to circumvent the Court’s intent of significantly limiting the inmate’s ability to control, manage, direct, finance, or otherwise participate in an illegal enterprise[.]” (Agreed-Upon

Motion at 10.) He further agreed that the restrictions, “although severe, are appropriate given Defendant’s history and propensity for recruiting co-conspirators through fellow inmates, corrections officers, and persons who are not incarcerated.” (Id. at 9.) Finally, he agreed that “these restrictions [should] remain in place until Defendant demonstrates his communications no longer pose a threat[.]” (Id.; see also Plea Agreement ¶ 7(d))

The Court reviewed the communication restrictions, as stated in the Plea Agreement, with Defendant at his Change of Plea Hearing:

[THE COURT]: D) The government agrees to file, prior to sentencing, a motion under Title 18, United States Code, Section 3582([e]) requesting imposition of certain conditions of imprisonment including the following:

One, you should be confined during your time of incarceration so that you have no contact with other prisoners.

Two, your communication is restricted from all persons inside and outside of prison except for.

(A) Your stepmother, Carol Ferdette [sic].

(B) Joe Rosenbaum, your attorney and,

(C) Kimberly Acevedo, your paralegal.

Three, these restrictions shall remain until such time, as when you demonstrate your communications no longer pose a threat.

...

[THE COURT]: The terms that I summarized to you, are those the terms of your plea agreement with the government as you understand them?

A. Yes.

(D.E. 298 at 49:1-14; 59:12-14.) Defendant acknowledged that he signed the Plea Agreement, read it before signing it, fully discussed it with his attorney before signing it, and understood all of its terms before signing it. (Id. at 57:2-14.)

The Government memorialized the Parties agreed-upon communication restrictions in the Agreed-Upon Motion. (D.E. 286.) At the Sentencing Hearing, the Court granted the Agreed-Upon Motion and ordered that Defendant's communications be restricted to Carol Fardette, Joseph Rosenbaum, and Kimberly Acevedo. (Sentencing Hr'g Tr. at 31:22 – 33:2.) The Court subsequently entered a written Order granting the Agreed-Upon Motion finding that “that there is probable cause to believe that Defendant's association or communication with persons other than his step-mother, his attorneys, or the attorney's staff would enable Defendant to “control, manage, direct, finance, or otherwise participate in an illegal enterprise.” (D.E. 286 at 5 (quoting 18 U.S.C. § 3582(e)).) The Order states:

b. Defendant should be limited, within the U.S. Marshals Service/BOP/detention facility's reasonable efforts and existing confinement conditions, from having contact (including passing or receiving any oral, written, or recorded communications) with any other inmate, visitor, attorney, or anyone else, that could reasonably foreseeably result in Defendant communicating (sending or receiving) information that could allow Defendant to circumvent the Court's intent of significantly limiting Defendant's ability to control, manage, direct, finance, or otherwise participate in an illegal enterprise;

c. The restrictions specified above should permit Defendant's contacts and communications with the following persons:

- i. Carol Fardette, Defendant's step-mother;
- ii. Joseph S. Rosenbaum, Esq., Counsel for Defendant; and
- iii. Kimberly Acevedo, Esq., Co-Counsel for Defendant; and

d. The restrictions specified above shall remain in place until Defendant demonstrates his communications no longer pose a threat.

(Id. at 8-9.) The Amended Judgment also contains the communication restrictions that Defendant agreed to and insisted upon. (D.E. 306 at 3.)

The Court finds that the Defendant has not demonstrated that his communications no longer pose a threat. Defendant wholly fails to contest the Government's assertion that Defendant's "various letters and other communications continue to be seized, pursuant to the communications restrictions, because they discuss his purported terrorist affiliations and criminal activity." (Resp. at 3.) The Court further finds that, given Defendant's history, permitting the Defendant to have contact with Mr. Calegan could reasonably foreseeably result in Defendant communicating information that could allow Defendant to circumvent the Court's intent of significantly limiting his ability to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

In light of Defendant's history of conducting two separate criminal enterprises while incarcerated by persuading and directing contacts on the outside to facilitate his criminal enterprises, the Court's Order Granting the Government's Agreed-Upon Motion pursuant to 18 U.S.C. § 3582(e), and further considering that the Defendant's seized letters and other communications discuss terrorist affiliations and criminal activities, the Court denies Defendant's request to modify communication restrictions.

III. Conclusion

Accordingly, it is **ORDERED AND ADJUDGED** that Defendant's Motion to Modify Communication Restrictions Imposed by the Court's Order as it Relates to Social Contact Gerald J. Calegan is **DENIED**.

DONE AND ORDERED in Chambers at Miami, Florida this 1st day of May, 2020.


JOAN A. LENARD
UNITED STATES DISTRICT JUDGE