

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

DZHOKHAR TSARNAEV

No. 13-CR-10200-GAO

**MOTION TO VACATE SPECIAL ADMINISTRATIVE MEASURES (“SAMs”)
IMPOSED ON DEFENDANT AND DEFENSE COUNSEL**

By memorandum dated August 27, 2013 (“Aug. 27 Memorandum”) — more than four months after the defendant, Dzhokhar Tsarnaev, was arrested — the Attorney General, at the behest of United States Attorney Carmen Ortiz, implemented Special Administrative Measures (“SAMs”) that impose extraordinary and severe restrictions impairing the ability of defense counsel to provide competent representation. Among other things, the SAMs limit Mr. Tsarnaev’s interactions with individuals assisting defense counsel and restrict the communications and other activities of the defense team in furtherance of the defense. A copy of the Aug. 27 Memorandum is attached hereto as Exhibit A.

Defense counsel first learned of the SAMs on Friday, August 30, 2013, after members of the defense team were denied entrance to FMC Devens for a previously-scheduled and approved visit with Mr. Tsarnaev. Attorney-client meetings were permitted to resume only after members of the defense team signed agreements to abide by the SAMs. A blank copy of the SAMs agreement is attached hereto as Exhibit B.

In the circumstances of this case, SAMs are unlawful and unwarranted. The government has provided scant factual support for its conclusory assertion that SAMs are required now, more than four months into Mr. Tsarnaev’s already highly restrictive pretrial confinement, in order to

protect others from “death or serious bodily injury.” The government has not alleged that Mr. Tsarnaev has done or said anything since his arrest to commit violence, incite violence, or engage in communications that pose a security threat. Moreover, the SAMs violate the First, Fifth, and Sixth Amendments to the United States Constitution. The Court therefore should declare that the SAMs are unlawful and order that they be vacated.

Background

A. Purported Factual Basis for SAMs.

The purported factual basis for the SAMs is set forth in the introduction to the Aug. 27 Memorandum, quoted here in its entirety:

Federal Bureau of Prisons (BOP) pretrial inmate Dzhokhar Tsarnaev is charged in a thirty-count indictment with, among other things, use of a weapon of mass destruction, bombing a place of public use, carjacking, conspiracy, and firearms violations. Tsarnaev is currently housed by BOP at the Federal Medical Center Devens in Ayer, Massachusetts, pending trial. The United States Attorney for the District of Massachusetts (USA/DMA) has requested that Special Administrative Measures (SAM) be imposed on Tsarnaev because there is a substantial risk that his communications or contacts with persons could result in death or serious bodily injury to persons. The Federal Bureau of Investigation (FBI) concurs in this request.

As detailed in the attached request from the USA/DMA and as later supplemented telephonically, on April 15, 2013, Tsarnaev and his brother, Tamerlan Tsarnaev, carried out a pre-meditated and coordinated detonation of improvised explosive devices in Boston, Massachusetts, that killed, dismembered, or injured dozens of people during the Boston Marathon. Tsarnaev and his brother were inspired to commit the attack by Anwar al-Aulaqui, a deceased leader of al-Qaeda, and used bomb-making instructions from “Inspire,” an al-Qaeda publication. Tsarnaev employed operational tradecraft in communicating during the time leading up to the bombing (including purchasing a dedicated cell phone to communicate with respect to the bombings), and in disposing of evidence after the attack, including discarding a remaining bomb detonator and smashing his cell phones.

During the days following the attacks, as law enforcement engaged in a massive manhunt for the perpetrators, Tsarnaev and his brother made additional bombs, and Tsarnaev convinced his associates to attempt to destroy evidence related to the Boston Marathon bombing. In addition, on April 19, 2013, Tsarnaev and his brother killed a Massachusetts Institute of Technology police officer, carjacked a

civilian, and attempted to kill law enforcement officers during a violent confrontation. Tsarnaev's brother was killed during the drawn-out altercation, while Tsarnaev evaded capture and eventually hid inside a drydocked boat in a residential neighborhood. While hiding, Tsarnaev scrawled messages on the boat including: "The U.S. Government is killing our innocent civilians"; "I can't stand to see such evil go unpunished"; "We Muslims are one body, you hurt one you hurt us all"; "Now I don't like killing innocent people it is forbidden in Islam but due to said [unintelligible] it is allowed"; and "Stop killing our innocent people and we will stop."

On or about April 22, 2013, following his capture, Tsarnaev was interviewed by the FBI. During the interview, Tsarnaev reaffirmed his commitment to jihad and expressed hope that his actions would inspire others to engage in violent jihad. There is no indication that Tsarnaev's intentions have changed since.

On May 3, 2013, the FBI arrested three associates of Tsarnaev for their involvement, at Tsarnaev's behest, in attempting to destroy evidence and obstruct the government's investigation. On August 8, 2013, two of these associates were indicted on charges of obstruction of justice and conspiracy to obstruct justice. The FBI continues to investigate whether additional accomplices remain at large.

On May 24, 2013, while incarcerated, Tsarnaev was permitted to call his mother in Russia, who recorded the call and subsequently released portions of the call to the media, in an apparent effort to engender sympathy for Tsarnaev. Tsarnaev has also gained widespread notoriety while incarcerated, as evidenced by his receipt of nearly one thousand pieces of unsolicited mail.

On June 27, 2013, a federal grand jury in the District of Massachusetts indicted Tsarnaev on thirty counts that included use of a weapon of mass destruction, bombing a place of public use, carjacking, conspiracy, and firearms violations.

The USA/DMA believes there is a substantial risk that Tsarnaev's communications may result in the death of or serious bodily injury to persons, based on: Tsarnaev's participation in planning and executing the Boston Marathon bombings; his ensuing acts of violence and flight to avoid apprehension; his extensive obstruction of justice; and his explicit and continuing desire to incite others to engage in violent jihad.

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

Ex. A at 1-3.

B. Summary of Key Restrictions.

The SAMs impose a wide variety of restrictions on the defense team, and Mr. Tsarnaev, including the following:

1. Provisions Related to Defense Counsel.

SAMs affirmation. Each attorney representing Mr. Tsarnaev must sign an affirmation acknowledging awareness of and understanding of the SAMs and agreement to abide by its restrictions, particularly those that relate to contact between the inmate and his attorneys and the attorneys' staff. Each attorney must acknowledge the restriction that they will not forward third party messages to or from Mr. Tsarnaev. Ex. A ¶ 2.a.

Restrictions on disseminating Mr. Tsarnaev's communications. An attorney may disseminate the contents of the inmate's communications to third parties "for the sole purpose of preparing the inmate's defense — and not for any other reason." Only an attorney, and not an attorney's staff, may disseminate such communications. Ex. A ¶ 2.d.

Restrictions on Legal Visits. Only the attorney's pre-cleared paralegal (a paralegal who has passed background checks and signed the SAMs affirmation) may meet with Mr. Tsarnaev unaccompanied by an attorney. Ex. A ¶ 2.e. Investigators and interpreters may not meet alone with Mr. Tsarnaev. Ex. A ¶ 2.f.¹

Restrictions on Legal Phone Calls. Only pre-cleared attorneys and staff are permitted to communicate with Mr. Tsarnaev by telephone, and then only when an attorney is physically present and participating in the call. Ex. A ¶ 2.g.i. No person, other than pre-cleared attorneys, paralegals, or investigators may participate in the calls or even "listen to or overhear" any part of the calls. Ex. A. ¶ 2.g.ii.(1). The calls may not "be in an any manner recorded or preserved" except that an attorney may make written notes. Ex. A ¶ 2.g.ii.(3)(d). A footnote

¹ By letter dated September 11, 2013 (attached hereto as Exhibit C), the government agreed in principle to amend the SAMs to permit visits without attorney/paralegal accompaniment by pre-cleared investigators who are full-time Federal Public Defender employees. However, no amended SAMs have yet been issued and the BOP continues to enforce the existing provision to the letter. The government also declined to permit a mitigation specialist (essentially, an investigator) with decades of experience in capital cases, appointed under the CJA and previously cleared for multiple prior visits with Mr. Tsarnaev at FMC Devens, to continue meeting him without attorney/paralegal/FDO staff investigator accompaniment.

exempts USMS/BOP/DF, FBI, and DOJ from the prohibition on recording attorney-client calls, but then goes on to state that this section nevertheless “does not allow monitoring of attorney-client privileged communications.” Ex. A at 8, n.5.

Restrictions on Documents Provided by Attorney. An attorney may provide Mr. Tsarnaev with, or review with him, “documents related to his defense, including discovery materials, court papers (including indictments, court orders, motions, etc.), and/or material prepared by the inmate’s attorney.” Ex. A ¶ 2.h. Materials provided may not “include inflammatory materials, materials inciting violence, military training materials, or materials that may be used to pass messages from inmate to inmate, unless such materials have been precleared by the USA/DMA and FBI. Ex. A ¶ 2.h.i.²

Legal Mail. Any attorney “may not send, communicate, distribute, or divulge the inmate’s mail, or any portion of its contents (legal or otherwise) to third parties . . . [O]nly case-related documents will be presented to the inmate, and . . . neither the attorney or his or her staff will forward third party mail to or from the inmate.” Ex. A ¶ 2.i.

2. Other Provisions.

Outside Contacts. The SAMs restrict Mr. Tsarnaev’s non-legal mail, phone calls, and visits to immediate family members only – defined narrowly as spouse (he has none), natural children (he has none), parents, and siblings. Ex. A ¶¶ 3.a.i., n.7; 3.a.i.; 3.f.i.; 3.g.i. He can send no more than one letter, comprised of no more than three double-sided pages, to one adult recipient per week. Ex. A ¶ 3.g.i. Only one adult may visit at a time, without any physical contact. Ex. A ¶ 3.f.ii. Family members may not record telephone calls or divulge the contents of any communication to any third party. Ex. A ¶¶ 3.b.; 3.f.; 3.g. All such non-legal contacts will be monitored, copied, and/or recorded. Ex. A ¶¶ 3.d.; 3.f.; 3.g. Review of incoming mail may take 14 days for English-language mail and 60 days for foreign-language mail. Ex. A ¶ 3.g.iv.

Media access. Mr. Tsarnaev may not communicate, directly or indirectly, with the news media. Ex. A ¶ 4. He is, however, permitted to receive pre-screened publications and books. Ex. A ¶¶ 9; 10. While the SAMs permit access to radio and television, Ex. A ¶ 9.b, the unit where Mr. Tsarnaev is housed at FMC Devens does not.

Isolation and restrictions within detention facility. Mr. Tsarnaev may not participate in group prayer services with other inmates. Ex. A ¶ 5.a. He may not

² In its September 13 letter, the government stated that “all discovery materials in this case are precleared by the USA and FBI for review by the defendant,” even though some of those materials may otherwise violate this provision of the SAM. Ex. C.

share a cell and is to be prevented from communicating orally or in writing with other inmates. Ex. A ¶¶ 6, 7.

C. Purported “Reasonable Necessity” of the Restrictions.

The “Conclusion” of the Aug. 27 Memorandum, set forth here in its entirety, purports to explain why the foregoing restrictions are “reasonably necessary”:

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

With respect to telephone privileges, the SAM are reasonably necessary because of the high probability of calls to co-conspirators to arrange terrorist or criminal activities.

With respect to mail privileges, the SAM are reasonably necessary to prevent the inmate from receiving or passing along critically timed messages. Although I recognize that eliminating the inmate’s mail privileges entirely may be an excessive measure except in the most egregious of circumstances, I believe that delaying mail delivery and allowing authorized personnel to examine a copy of the mail is sufficient at this time to adequately ensure that the mail is not used to deliver requests for, or to assist in, violent and/or terrorist activities. Under these procedures, the inmate can relate personal news to family members, even if delayed, but he may find it difficult or unwise to pass along restricted information.

To the extent that the use of an interpreter/translator is necessary, the government has the right to ensure that the interpreter/translator given access to the inmate is worthy of trust.

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

The SAM’s limitations on access to mass communications are reasonably necessary to prevent the inmate from receiving and acting upon critically timed messages. Such messages may be placed in advertisements or communicated

through other means, such as the television and/or radio. Although I recognize that eliminating the inmate's access to such media may be an excessive measure except in the most egregious of circumstances, I believe that limiting and/or delaying such access may interrupt communication patterns the inmate may develop with the outside world, and ensure that the media is not used to communicate information that furthers terrorist, violent, and/or criminal activities.

Ex. A at 16-17.

Argument

I. THE SAMs ARE UNWARRANTED.

Title 28 of the Code of Federal Regulations, section 501.3 (“Prevention of acts of violence and terrorism”) vests power in the Director of the Bureau of Prisons (“BOP”), upon direction of the Attorney General, to authorize the warden of a detention center or prison to implement Special Administrative Measures (“SAMs”) that are “reasonably necessary to protect persons against the risk of death or serious bodily injury.” 28 C.F.R. § 501.3(a). The Attorney General may authorize SAMs upon finding 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.” *Id.* SAMs may include, but are not limited to: housing in administrative detention and/or restrictions on privileges such as correspondence, telephone, visits, and access to the media — in essence, any measure “reasonably necessary to protect persons against the risk of acts of violence or terrorism.” *Id.*

In addition, the BOP Director, if specifically ordered by the Attorney General, is empowered to implement “appropriate procedures for the monitoring or review of communications” between an inmate and “attorneys or attorneys’ agents who are traditionally covered by the attorney-client privilege.” 28 C.F.R. § 501.3(d). The Attorney General may issue such an order based upon a finding of “reasonable suspicion” that an “inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism.” *Id.* The

Attorney General must make an additional, specific certification of findings to impose SAMs under this section, 501.3(d), beyond any findings underlying measures imposed under section 501.3(a). *See* 28 C.F.R. § 501.3(d)(1). Monitoring may be conducted “for the purpose of “deterring future acts that could result in death or serious bodily injury to persons” 28 C.F.R. § 501.3(d).

Here, there is an insufficient factual basis to justify imposition of any SAMs. Moreover, neither section 501.3(a) nor section 501.3(d) authorizes restrictions on attorney-client contact of the sort contained in the SAMs here. The SAMs as a whole, and the attorney-client provisions in particular, are therefore arbitrary, capricious, an abuse of discretion, lack basis in substantial evidence, and are otherwise not in accordance with the law. *See Cracker v. DEA*, 714 F.3d 17, 26 (1st Cir. 2013) (court may invalidate administrative action “if it is arbitrary, capricious, an abuse of discretion, not supported by substantial evidence, or otherwise not in accordance with the law.”).

A. There is No Factual Basis to Conclude that SAMs are Necessary to Avoid Death or Serious Bodily Injury.

The government attempts to justify the SAMs based on Mr. Tsarnaev’s alleged “participation in planning and executing the Boston Marathon bombings; his ensuing acts of violence and flight to avoid apprehension; his extensive obstruction of justice; and his explicit and continuing desire to incite others to engage in violent jihad.” Ex. A at 2. Notably absent in the government’s litany is reference to any problematic behavior or efforts to incite others whatsoever in the months after his arrest before SAMs were imposed. The government’s leap to find “substantial risk” that mere “communications or contacts” could “result in death or serious bodily injury” amounts to rank speculation without any basis in fact. *See Mohammed v. Holder*, 2011 WL 4501959 (D. Colo. Sept. 29, 2011) (denying, in part, defendant prison officials’ motion

for summary judgment in civil action by convicted prisoner challenging SAM; “The Government’s general justifications for SAMs — involvement in terrorist activities and dangerous communications by others during incarceration — do not address Mr. Mohammed’s conduct or his particular risks [T]here has been no showing that new circumstances justify greater restriction.”).

To be sure, the underlying charges arising from the Marathon bombing and ensuing events in Watertown, for which Mr. Tsarnaev is awaiting trial, are grave. However, the government has not alleged, nor is the defense aware of any evidence to suggest, that these events were directed by others still at large or that Mr. Tsarnaev ever had operational authority to direct the activities of others. Since his arrest, Mr. Tsarnaev has been in a highly secure federal prison. He is incapacitated and obviously could not engage in similar behavior now. Nor is there any evidence whatsoever of the existence of co-conspirators with whom Mr. Tsarnaev could arrange further terrorist or criminal activities, much less a “high probability” that he would make calls to do so, as alleged by the government.

The government’s suggestion of “extensive obstruction of justice” by Mr. Tsarnaev is an overwrought characterization of its own allegations, and, again, only concerns conduct prior to arrest. Specifically, the government alleges that, prior to his arrest, Mr. Tsarnaev discarded evidence (including a leftover “detonator”) and smashed cell phones. The government also claims that he “convinced his associates to attempt to destroy evidence.” However, the government’s own allegations against those associates belie this characterization. By separate indictment, the government charged three college friends of Mr. Tsarnaev with removing and disposing of certain items from Mr. Tsarnaev’s dorm room and/or lying to investigators. *See United States v. Kadyrbaev et al*, 13-CR-10238-DPW (D. Mass.). According to that indictment,

the defendants removed and then disposed of certain items from Mr. Tsarnaev's dorm room after receiving a text message from him: "'If yu [sic] want yu [sic] can go to my room and take what's thereO but ight [sic] bra [sic] Salam aleikum.'" *Id.*, DE 36 (Indictment) at 7, Count One, "Overt Acts" ¶ b. The plain meaning of this alleged text message is that Mr. Tsarnaev gave his friends permission to take his worldly goods in anticipation of his own arrest or demise. The alleged text message does not instruct them to dispose of evidence or lie to investigators. Moreover, the government makes no suggestion that Mr. Tsarnaev has done anything to obstruct justice since his arrest, nor does it explain how Mr. Tsarnaev could possibly obstruct justice in the future absent SAMs, or how SAMs might prevent such obstruction.

The government also fails to explain how Mr. Tsarnaev's alleged commitment to "jihadist" ideology, and alleged hope that his actions would inspire others, justify the SAMs. While the government focuses on Mr. Tsarnaev's "notoriety" and states that he has received "nearly one thousand pieces of unsolicited mail," it fails to mention that Mr. Tsarnaev has not responded to any of this mail and ignores the significance of the fact that it was "unsolicited." To punish Mr. Tsarnaev, in effect, for something he has done nothing to encourage, is perverse. The government also fails to mention that none of this unsolicited mail could be characterized as "jihadist" in nature. Rather, it consisted almost entirely of letters and cards from individuals who believe he is innocent and people urging him to repent and convert to Christianity. All of this mail was screened under ordinary BOP procedures and deemed acceptable to be transmitted to him.

The government's further reliance on an incident in May, barely a month after his arrest, when Mr. Tsarnaev's mother released portions of a recorded phone call with him to the media "in an apparent effort to engender sympathy" is telling. While the government may not want

anyone to feel “sympathy” for Mr. Tsarnaev, that is not a proper basis to impose SAMs. Mr. Tsarnaev’s mother was distraught and sought to reassure the world that her son was, in fact, alive, recuperating from his wounds, ambulatory, eating, etc. She has not released any call recordings since that time and her further contact with Mr. Tsarnaev could easily be conditioned on her agreement not to record or release future calls, without the need for draconian and wide-reaching SAMs.

B. The SAM Restrictions on Counsel are Not Authorized Under the Regulation.

Section 501.3(a) allows various restrictions on a detainee’s conditions of confinement but does not mention any restrictions on attorney-client contact or communications.³ Only section 501.3(d) addresses attorney-client communications, and even that provision does not contemplate restrictions on attorney speech or activities outside prison walls.⁴ In addition, any measures under section 501.3(d) would require a separate and specific certification and finding by the Attorney General that “reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism” 28 C.F.R. § 501.3(d). Here, defense counsel have not received any written notice under section

³ Indeed, section 501.3(a) speaks only to administrative segregation and curtailment of various “privileges.” No one could plausibly contend that the right of a defendant to communicate with his or her attorney is a mere “privilege”; it is a fundamental constitutional right.

⁴ A regulation that did expressly authorize restrictions on attorney speech would raise separate constitutional concerns. Courts have upheld such restrictions only where they are necessary to protect the integrity of the judicial process. *See, e.g., Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991) (“The First Amendment protections of speech and press have been held . . . to require showing of ‘clear and present danger’ that a malfunction in the criminal justice system will be caused before a State may prohibit media speech or publication about a particular pending trial” by an attorney.); *United States v. Scarfo*, 263 F.3d 80, 95 (3d Cir. 2001) (“[W]e can see no valid reason to interdict a lawyer’s First Amendment right of speech” unless there is evidence that the proscribed speech would “jeopardize[] the fairness of the trial or in any way materially impair[] or prejudice[] the judicial power of the court.”).

501.3(d) and cannot fathom how they reasonably could be suspected of facilitating acts of terrorism. In other words, no order under section 501.3(d) has been issued.

Instead, the existing SAMs apparently have been issued under section 501.3(a), which does not authorize any restrictions on attorney-client contact or communications. *See Kent v. Dulles*, 357 U.S. 116, 129 (1958) (“[W]e will construe narrowly all delegated powers that curtail or dilute” fundamental constitutional rights). The government’s attempt to use its physical custody of Mr. Tsarnaev, custody it possesses solely by virtue of this Court’s detention order and for no other reason, as a lever to control the attorney-client relationship is a misuse of authority that does not belong to it.

Even assuming, for the sake of argument only, that restrictions on attorney contact, speech, and conduct were authorized under section 501.3(a), the government has failed to demonstrate that contacts with court-appointed attorneys create a “substantial risk” of “death or serious bodily injury.” There is no basis whatsoever to suspect that appointed attorneys and those assisting them would intentionally pass dangerous communications to others. The speculative and theoretical possibility that such communications could be passed unintentionally does not constitute a “substantial risk” as a matter of law. *Cf. Leocal v. Ashcroft*, 543 U.S. 1 (2004) (holding that unintentional conduct does not constitute substantial risk of use of force).

The restrictions relating to counsel in the SAMs are therefore contrary to underlying regulatory authority and lacking a basis in substantial evidence. They should be stricken.

II. THE SAMs VIOLATE THE U.S. CONSTITUTION.

The legitimate purpose of pretrial detention is not punishment but rather to ensure public safety and the defendant’s presence at trial. *See generally, Bell v. Wolfish*, 441 U.S. 520 (1979). Pretrial detainees “retain at least those constitutional rights that we have held are enjoyed by

convicted prisoners,” *id.* at 545, and their conditions of confinement may not be punitive in nature. *Id.* at 535 (“In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against the deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee.”); *see also City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (holding that the due process rights of a pretrial detainee “are at least as great as the Eighth Amendment protections available to a convicted prisoner.”). In addition, when “an institutional restriction infringes a specific constitutional guarantee,” such as the First Amendment or Sixth Amendment, “the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security.” *Bell*, 441 U.S. at 547.

The First Circuit has held that *Bell* requires a balancing test, weighing the “scope of the particular intrusion” against the government’s justification for that measure. *Roberts v. Rhode Island*, 239 F.3d 107, 110 (1st Cir. 2001). While prison officials are entitled to deference,⁵ the court does not abdicate its role in reviewing their conduct. *See id.* at 113 (affirming lower court decision holding that search policy of intake facility was unconstitutional).

Here, the SAMs violate the Constitution in a variety of ways without a sufficient justification related to institutional order and security or public safety.

A. The SAMs Violate Due Process and Thwart Effective Assistance of Counsel.

Mr. Tsarnaev is entitled to the effective assistance of counsel for his defense under the Due Process Clause and the Sixth Amendment. Access to counsel is particularly critical during the pre-trial stage. *See, e.g., Maine v. Moulton*, 474 U.S. 159, 170 (1985) (“[T]o deprive a

⁵ Notably, the SAMs at issue here were not initiated by prison officials during the first four-plus months of Mr. Tsarnaev’s confinement. Rather, they were implemented by order of the Attorney General at the behest of U.S. Attorney Ortiz, who is not a “prison official” with specialized correctional knowledge and experience that warrants deference in this context.

person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.”); *Wolfish v. Levi*, 573 F.2d 118 (2d Cir. 1978) (“[O]ne of the most serious deprivations suffered by a pretrial detainee is the curtailment of his ability to assist in his own defense.”), *rev’d on other grounds*, *Bell v. Wolfish*, 441 U.S. 520 (1979); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051 (8th Cir. 1989) (when access to counsel “is inadequately respected during pre-trial confinement, the ultimate fairness of their eventual trial can be compromised.”). The Supreme Court has held that “[r]egulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid.” *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) (citing *Ex Parte Hull*, 312 U.S. 546 (1941)), *overruled in part on other grounds*, *Thornburgh v. Abbott*, 490 U.S. 401, 419 (1989).

Professor LaFave’s *CRIMINAL PROCEDURE* (3d ed. 2012) begins subsection (a) (“Restrictions Upon Counsel’s Assistance”) of section 11.8 (“Ineffective Assistance Claims Based Upon State Interference and other Extrinsic Factors”) with the following analysis:

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

Wayne R. LaFave, et al., *CRIMINAL PROCEDURE* § 11.8 (3d ed. 2012) (citations omitted).

The SAMs severely impair the defense function in this case in a variety of ways. They have a dramatic chilling effect on the defense team’s ability to prepare a thorough and vigorous defense and they also erect a variety of practical obstacles.

1. Areas of Interference with the Defense.

a. “Dissemination” of Communications.

The SAMs provide that counsel may “disseminate the contents of the inmate’s communication to third parties for the sole purpose of preparing the inmate’s defense – and not for any other reason . . .” Ex. A ¶ 2.d. This provision is inconsistent with the provision governing Legal Mail, which states that counsel “may not send, communicate distribute, or divulge the inmate’s mail, or any portion of its contents (legal otherwise), to third parties,” without exception. Ex. A ¶ 2.i. Reading these provisions together, the SAMs apparently permit counsel to share information obtained from Mr. Tsarnaev orally or in person⁶ “for the purpose of preparing the defense” but prohibit counsel from sharing information obtained from him by mail under any circumstances for any purpose. The disparate treatment of information obtained from Mr. Tsarnaev based on the medium of communication is the very definition of “arbitrary and capricious.” It is also completely impractical for members of the defense team to keep track of the means by which they have learned individual pieces of information from Mr. Tsarnaev.

Moreover, the prohibition on dissemination of information obtained from Mr. Tsarnaev for purposes other than “preparing the . . . defense” is unconstitutionally vague. It is difficult for undersigned counsel to conceive why they would ever share Mr. Tsarnaev’s communications for a purpose unrelated to preparing the defense. But the SAMs do not define “preparing the

⁶ The SAMs do not expressly address a situation where Mr. Tsarnaev might provide a writing that he has composed to defense counsel in person during a meeting. Transmittal of such writings in person is not prohibited by the SAMs and defense counsel therefore assume that the content of such writings would be covered under ¶ 2.d.

defense” nor is it clear who might seek to arrogate to themselves the authority to decide in hindsight what such preparation properly may include.

This is a capital case. Defense counsel must necessarily seek input from Mr. Tsarnaev on many issues, including his family history. The information he provides may well inform follow-up investigation. Because of the SAMs, information from Mr. Tsarnaev will have to be segregated from all other information in the case to avoid inadvertent disclosures. Information obtained from Mr. Tsarnaev prior to the SAMs will also have to be segregated from information obtained post-SAMs. While it is impossible to detail all instances in which information from Mr. Tsarnaev might need to be disseminated, they are numerous and various. Would the government second-guess the defense team for interviewing prospective witnesses based on information obtained from Mr. Tsarnaev? Identifying and interviewing witnesses lie at the core of defense counsel’s obligations. *See American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (“ABA Guidelines”)* (2003) at 79, 104 (requiring counsel to interview “witnesses familiar with aspects of the client’s life history that might affect the likelihood that the client committed the charged offense(s), [and/or] the degree of culpability for the offense. . . .”). Would the government second-guess the defense team for discussing information about Mr. Tsarnaev’s medical condition and about the case with his parents? *See ABA Guidelines* at 70 (“It is also essential for the defense team to develop a relationship of trust with the client’s family or others on whom the client relies for support and advice.”).

In the end, the defense is left to operate in the shadow of fear that the government may charge, after the fact, that some “dissemination” violated the SAMs.⁷ The restrictions imposed

⁷ New York defense attorney Lynne Stewart was sentenced to 10 years in federal prison on charges that included violation of SAMs. *See United States v. Stewart*, No. 02-CR-00395-JGK

by the SAM (and looming threat of prosecution for any “violation”) will chill the informed judgment of the attorneys appointed to defend Mr. Tsarnaev, unnecessarily burden the legal process, and threatens to warp their representation from zealous advocacy to overly cautious and indeed timid advocacy. *See* Joshua L. Dratel, *Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 81, 88 (2003) (“The S.A.M.s also unquestionably exert a chilling effect upon counsel. Given the nature and scope of the proscriptions, it is doubtful that any lawyer could maintain a perfect record of compliance. Thus, the government has maximum discretion regarding whom to prosecute, for what conduct, and when. The question is willfulness, and the government has the power to decide to whom it wishes to afford the benefit of the doubt.”).

b. Documents Provided by Attorney to Inmate.

The SAMs provide that during a visit “the attorney may provide the inmate, or review with the inmate, documents related to his defense, including discovery materials, court papers (including indictments, court orders, motions, etc.) and/or material prepared by the inmate’s attorney . . .” Ex. A ¶ 2.h. This provision suffers a constitutional vagueness problem similar to the “communications” provision discussed above – who may second-guess defense counsel’s determination of whether a document is properly “related to . . . the defense”?⁸

(S.D.N.Y.), DE 1041 (judgment dated July 29, 2010). While undersigned counsel do not condone the conduct underlying her conviction — among other things, Stewart apparently announced to the press that her client, a prominent Egyptian Sheikh and cleric, was withdrawing his support for a cease-fire — the particulars of that case highlight the excessiveness of SAMs here, where there is no allegation that Mr. Tsarnaev has any connection to any outside organization.

⁸ This is not merely a theoretical concern. For example, in early September, BOP personnel at FMC Devens prohibited defense counsel from showing photographs, some of which depicted family members, to Mr. Tsarnaev. After initial discussions between the government and defense counsel, the government maintained that family photographs were “non-legal materials.” Ex. C. After further consultations, the government reconsidered its position and acknowledged that

In addition, the government and BOP apparently take the position that the BOP has the discretion to review materials brought into the facility, not only for “contraband” that could threaten institutional security (a standard part of custodial legal visits at any institution), but also for substantive content:

BOP needs to review all materials brought into BOP facilities to ensure the safety and security of the institution, its inmates, and BOP personnel. The review is normally performed by an officer at the front desk. In the case of purported legal materials brought in by a member of an inmate’s defense team, the review is only as extensive as needed to ensure that the materials are in fact legal materials. If the officer determines that the materials are in fact legal, he or she does not normally report on the contents of the materials to higher level BOP officials (let alone to the prosecution team) except in extraordinary circumstances; the officers therefore effectively operate as a taint team.

If, however, an officer has a question about certain material, he or she may bring it to the attention of the supervising lieutenant, who may in turn seek guidance from other BOP personnel, including BOP attorneys. In addition, if BOP has reason to believe that members of the defense team have attempted to carry non-legal materials into the facility in violation of the SAM, they may bring that to the attention of the US Attorney’s Office.

Ex. B at 2. Any such content-based review of defense materials violates the confidentiality of defense work product and exposes the privileged subject matter of planned attorney-client communications.

c. Practical Obstacles.

The SAMs’ restrictions on attorney conduct also erect a number of other unnecessary and unwarranted practical obstacles to the defense team’s work.

In addition to the problems with restrictions on dissemination of communications highlighted above, the SAMs provide that only an attorney – not a paralegal or investigator – may make a “permitted” dissemination for purposes of preparing this defense. This creates a

family photographs could be shown “as long as they are related to his defense.” Ex. D. While this particular issue was resolved, it highlights the chilling and uncertain environment in which the defense must operate under the SAMs, and the intrusions into attorney work product and privileged communications that result along the way.

host of practical problems both internally – a paralegal or investigator may not distribute his or her write-up of a meeting with Mr. Tsarnaev among other defense team members – and externally – an investigator may not reference information obtained from Mr. Tsarnaev during a witness interview. These provisions are completely unworkable. *See United States v. Mikhel*, 552 F.3d 961, 964 (9th Cir. 2009) (ordering modification of SAM, unopposed by government, permitting investigators to disseminate communication for purpose of preparing defense).

The government’s continued refusal to permit the defense team mitigation specialist (investigator) who is not an FDO employee (but is appointed under the CJA, experienced in such matters, and previously cleared into FMC Devens) to visit Mr. Tsarnaev unless in the company of counsel or full-time Federal Public Defender staff is also without reasonable basis. In *Mikhel*, the Court could find no “valid rational justification” for distinguishing between paralegals and investigators employed by the Federal Defender. *Id.* Likewise, here, there is no valid basis to distinguish between an FDO-employed investigator and an otherwise experienced and reliable investigator appointed under the CJA, who is also under the supervision of appointed counsel.

Finally, the SAMs make no express provision for admission of defense-retained expert witnesses (whether or not anticipated to testify) to visit with Mr. Tsarnaev, and contain no provision to insulate defense requests for additional access to Mr. Tsarnaev from prosecutors of record in the case, thereby vitiating the confidentiality of attorney work product.

2. The Purported “Security” Justification for Interference with Counsel Is Unpersuasive.

To justify the wide-ranging impairments of the defense function contained in the SAMs, the government has offered nothing but speculation about possible security risks. The government must do more than allege that Mr. Tsarnaev is dangerous. The government must

also make out a rational case that appointed counsel may assist him in dangerous activity absent the SAMs. As the Seventh Circuit has noted:

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

Adams v. Carlson, 488 F.2d 619, 632-33 (7th Cir. 1973) (emphasis added). Like the Seventh Circuit, this Court should be unwilling to assume – as the government apparently has – that court-appointed counsel, who have no previous connection to Mr. Tsarnaev and are financially independent of his family and any supporters, would be willing to assist in illegal activity. The attorney-client provisions of the SAM are unwarranted and should be vacated.

B. The SAMs Violate the First Amendment.

The blanket prohibition of non-legal communications with persons other than immediate family members (as narrowly defined in the SAMs), including the media, plainly burden free speech and association rights. *See, e.g., Mohammed v. Holder*, 2009 WL 529549 (D. Colo. 2009) (denying defendants' motion to dismiss; holding that complaint regarding restrictions on family contacts states colorable claim of First Amendment violation); *Hale v. Ashcroft*, 2008 WL 4426095 at *4 (D. Colo. 2008) (SAMs' restrictions on communications with family members clearly "impaired" his "First Amendment interests"). The restriction on group prayer also infringes the free exercise of religion. *See, e.g., Reid v. Wiley*, 2009 WL 1537879 (D. Colo.

2009) (denying motion to dismiss free exercise claim by prisoner denied group prayer under SAMs).

The government has not made any persuasive showing why these restrictions are necessary, nor has it demonstrated that less restrictive alternatives would not suffice. Mr. Tsarnaev has made no effort to communicate with non-family or media, and is unlikely to do so. The blanket prohibitions in the SAMs are nevertheless improper. There is no allegation or evidence that Mr. Tsarnaev acted in concert with outside groups, that any such groups have sought to communicate with him, or that his receipt of such communications while detained would pose any danger.

C. Other Provisions of the SAMs are Effectively Punitive and Therefore Violate Due Process.

The restrictions on Mr. Tsarnaev leave him in nearly total isolation. He is confined to his cell except for legal visits and very limited access to a small outdoor enclosure, on weekdays, weather-permitting. The purported basis for these conditions lies in the crimes he is alleged to have committed prior to arrest, not any behavior during his confinement.

The negative effects of isolation on detainees are well-documented. *See generally, e.g.*, Laura Rovner and Jeanne Theoharis, *Preferring Order to Justice*, 61 AM. U. L. REV. 1331, 1358-1371 (June 2012) (summarizing literature and cases concerning effects of SAM-imposed isolation, including harmful effects on physical/mental health, coercive impact of those effects, and deterioration of client's ability to assist in his own defense); Atul Gawande, *Hellhole*, THE NEW YORKER, Mar. 30, 2009. Indeed, the United Nations identifies long-term solitary confinement as a form of torture. *See* Human Rights Committee, General Comment 20, Article 7 (44th session, 1992).

Inmates may not be subjected to unnecessarily harsh and isolating conditions of confinement. *See, e.g., Wilkinson v. Austin*, 545 U.S. 209, 223 (2005) (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)); (holding that protected liberty interest arises where prison regulations impose “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life” and finding liberty interest in avoiding placement in Ohio’s “supermax” facility). In the absence of a showing that there is a reasonable necessity for particular SAMs that impose harsh conditions of confinement, they are unlawful and should be vacated.

Conclusion

For the foregoing reasons, this Court should vacate the SAMs.

Respectfully submitted,

DZHOKHAR TSARNAEV
by his attorneys

/s/ William W. Fick

Judy Clarke, Esq.
California Bar: 76071
CLARKE & RICE, APC
1010 Second Avenue, Suite 1800
San Diego, CA 92101
(619) 308-8484
JUDYCLARKE@JCSRLAW.NET

Miriam Conrad, Esq. (BBO # 550223)
Timothy Watkins, Esq. (BBO # 567992)
William Fick, Esq. (BBO # 650562)
FEDERAL PUBLIC DEFENDER OFFICE
51 Sleeper Street, 5th Floor
(617) 223-8061
MIRIAM_CONRAD@FD.ORG
TIMOTHY_WATKINS@FD.ORG
WILLIAM_FICK@FD.ORG

Certificate of Service

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on October 2, 2013.

/s/ William W. Fick

Exhibit A



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

August 27, 2013

LIMITED OFFICIAL USE

MEMORANDUM FOR CHARLES E. SAMUELS, JR.
DIRECTOR
FEDERAL BUREAU OF PRISONS

FROM:  THE ATTORNEY GENERAL

SUBJECT: Origination of Special Administrative Measures Pursuant to
28 C.F.R. § 501.3 for Federal Bureau of Prisons
Pretrial Inmate Dzhokhar Tsarnaev

Federal Bureau of Prisons (BOP) pretrial inmate Dzhokhar Tsarnaev is charged in a thirty-count indictment with, among other things, use of a weapon of mass destruction, bombing a place of public use, carjacking, conspiracy, and firearms violations. Tsarnaev is currently housed by BOP at the Federal Medical Center Devens in Ayer, Massachusetts, pending trial. The United States Attorney for the District of Massachusetts (USA/DMA) has requested that Special Administrative Measures (SAM) be imposed on Tsarnaev because there is a substantial risk that his communications or contacts with persons could result in death or serious bodily injury to persons. The Federal Bureau of Investigation (FBI) concurs in this request.

As detailed in the attached request from the USA/DMA and as later supplemented telephonically, on April 15, 2013, Tsarnaev and his brother, Tamerlan Tsarnaev, carried out a pre-meditated and coordinated detonation of improvised explosive devices in Boston, Massachusetts, that killed, dismembered, or injured dozens of people during the Boston Marathon. Tsarnaev and his brother were inspired to commit the attack by Anwar al-Aulaqui, a deceased leader of al-Qaeda, and used bomb-making instructions from "Inspire," an al-Qaeda publication. Tsarnaev employed operational tradecraft in communicating during the time leading up to the bombing (including purchasing a dedicated cell phone to communicate with respect to the bombings), and in disposing of evidence after the attack, including discarding a remaining bomb detonator and smashing his cell phones.

LIMITED OFFICIAL USE

SPECIAL ADMINISTRATIVE MEASURES (SAM)

Page 2

Pursuant to 28 C.F.R. § 501.3

Inmate - Tsarnaev, Page 2

During the days following the attacks, as law enforcement engaged in a massive manhunt for the perpetrators, Tsarnaev and his brother made additional bombs, and Tsarnaev convinced his associates to attempt to destroy evidence related to the Boston Marathon bombing. In addition, on April 19, 2013, Tsarnaev and his brother killed a Massachusetts Institute of Technology police officer, carjacked a civilian, and attempted to kill law enforcement officers during a violent confrontation. Tsarnaev's brother was killed during the drawn-out altercation, while Tsarnaev evaded capture and eventually hid inside a drydocked boat in a residential neighborhood. While hiding, Tsarnaev scrawled messages on the boat including: "The U.S. Government is killing our innocent civilians"; "I can't stand to see such evil go unpunished"; "We Muslims are one body, you hurt one you hurt us all"; "Now I don't like killing innocent people it is forbidden in Islam but due to said [unintelligible] it is allowed"; and "Stop killing our innocent people and we will stop."

On or about April 22, 2013, following his capture, Tsarnaev was interviewed by the FBI. During the interview, Tsarnaev reaffirmed his commitment to jihad and expressed hope that his actions would inspire others to engage in violent jihad. There is no indication that Tsarnaev's intentions have changed since.

On May 3, 2013, the FBI arrested three associates of Tsarnaev for their involvement, at Tsarnaev's behest, in attempting to destroy evidence and obstruct the government's investigation. On August 8, 2013, two of these associates were indicted on charges of obstruction of justice and conspiracy to obstruct justice. The FBI continues to investigate whether additional accomplices remain at large.

On May 24, 2013, while incarcerated, Tsarnaev was permitted to call his mother in Russia, who recorded the call and subsequently released portions of the call to the media, in an apparent effort to engender sympathy for Tsarnaev. Tsarnaev has also gained widespread notoriety while incarcerated, as evidenced by his receipt of nearly one thousand pieces of unsolicited mail.

On June 27, 2013, a federal grand jury in the District of Massachusetts indicted Tsarnaev on thirty counts that included use of a weapon of mass destruction, bombing a place of public use, carjacking, conspiracy, and firearms violations.

The USA/DMA believes there is a substantial risk that Tsarnaev's communications may result in the death of or serious bodily injury to persons, based on: Tsarnaev's participation in planning and executing the Boston Marathon bombings; his ensuing acts of violence and flight to avoid apprehension; his extensive obstruction of justice; and his explicit and continuing desire to incite others to engage in violent jihad.

LIMITED OFFICIAL USE

SPECIAL ADMINISTRATIVE MEASURES (SAM)

Page 3

Pursuant to 28 C.F.R. § 501.3

Inmate - Tsarnaev, Page 3

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

1. **General Provisions**

- a. **Adherence to Usual United States Marshals Service (USMS), BOP, and Detention Facility (DF) Policy Requirements** - In addition to the below-listed SAM, the inmate must comply with all usual USMS, BOP, and non-BOP DF policies regarding restrictions, activities, privileges, communications, etc. If there is a conflict between USMS/BOP/DF policies and the SAM, as set forth herein, where the SAM are more restrictive than usual USMS/BOP/DF policies, then the SAM shall control. If usual USMS/BOP/DF policies are more restrictive than the SAM, then USMS/BOP/DF policies shall control.
- b. **Interim SAM Modification Authority** - During the term of this directive, the Director, Office of Enforcement Operations (OEO), Criminal Division, may modify the inmate's SAM as long as any SAM modification authorized by OEO:
 - i. Does not create a more restrictive SAM;
 - ii. Is not in conflict with the request of the USA/DMA, FBI, or USMS/BOP/DF, or applicable regulations; and
 - iii. Is not objected to by the USA/DMA, FBI, or USMS/BOP/DF.
- c. **Inmate Communications Prohibitions** - The inmate is limited, within the USMS/BOP/DF's reasonable efforts and existing confinement conditions, from having contact (including passing or receiving any oral, written, or recorded communications) with any other inmate, visitor, attorney, or anyone else, except as outlined and allowed by this document, that could reasonably foreseeably result in the inmate communicating (sending or receiving) information that could circumvent the SAM's intent of significantly limiting the inmate's ability to communicate (send or receive) threatening or other terrorism-related information.

LIMITED OFFICIAL USE

SPECIAL ADMINISTRATIVE MEASURES (SAM)

Page 4

Pursuant to 28 C.F.R. § 501.3

Inmate - Tsarnaev, Page 4

d. Use of Interpreters/Translators by the USMS/BOP/DF -

- i. The USMS/BOP/DF may use Department of Justice (DOJ) approved interpreters/translators as necessary for the purpose of facilitating communication with the inmate.
- ii. No person shall act as an interpreter/translator without prior written clearance/approval from the USMS/BOP/DF, which shall only be granted after consultation with the FBI and USA/DMA.
- iii. Interpreters/translators utilized by the USMS/BOP/DF shall not be allowed to engage in, or overhear, unmonitored conversations with the inmate. Interpreters/translators shall not be alone with the inmate, either in a room or on a telephone or other communications medium.

2. Attorney-Client Provisions

- a. **Attorney¹ Affirmation of Receipt of the SAM Restrictions Document** - The inmate's attorney (or counsel) – individually by each if more than one – must sign an affirmation acknowledging receipt of the SAM restrictions document. By signing the affirmation, the attorney acknowledges his or her awareness and understanding of the SAM provisions and his or her agreement to abide by these provisions, particularly those that relate to contact between the inmate and his attorney and the attorney's staff. The signing of the affirmation does not serve as an endorsement of the SAM or the conditions of confinement, and does not serve to attest to any of the factors set forth in the conclusions supporting the SAM. However, in signing the affirmation, the inmate's attorney and precleared staff²

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

² "Prcleared," when used with regard to an attorney's staff, or "precleared staff member," refers to a co-counsel, paralegal, or investigator who is actively assisting the inmate's attorney with the inmate's defense, has submitted to a background check by the FBI, has

SPECIAL ADMINISTRATIVE MEASURES (SAM)

Page 5

Pursuant to 28 C.F.R. § 501.3

Inmate - Tsarnaev, Page 5

acknowledge the restriction that they will not forward third-party messages to or from the inmate.

- i. The USA/DMA shall present, or forward, the attorney affirmation of receipt of the SAM restrictions document to the inmate's attorney.
- ii. After initiation of the SAM and prior to the inmate's attorney being permitted to have attorney-client privileged contact with the inmate, the inmate's attorney shall execute a document affirming receipt of the SAM restrictions document and return the original to the USA/DMA.
- iii. The USA/DMA shall maintain the original of the SAM acknowledgment document and forward a copy of the signed document to OEO in Washington, D.C., and to the USMS/BOP/DF.

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

- i. **Necessity Requirement** - No interpreter/translator shall be utilized unless absolutely necessary where the inmate does not speak a common language with the attorney. Any interpreter/translator shall be precleared.³
- ii. **Attorney Immediate Presence Requirement** - Any use of an interpreter/translator by the attorney shall be in the physical and immediate presence of the attorney – *i.e.*, in the same room. The attorney shall not

successfully been cleared by the FBI, and has received a copy of the inmate's SAM and has agreed – as evidenced by his or her signature – to adhere to the SAM restrictions and requirements. As used in this document, “staff member” also refers to more than one staff member, and the provisions of this document shall be fully applicable to each such staff member in his or her individual capacity. A “paralegal” will also be governed by any additional DF rules and regulations concerning paralegals.

³ “Precleared,” when used with regard to an interpreter/translator, refers to an interpreter/translator who is actively assisting the inmate's attorney with the inmate's defense, has submitted to a background check by the FBI, has successfully been cleared by the FBI, and has received a copy of the inmate's SAM and has agreed – as evidenced by his or her signature – to adhere to the SAM restrictions and requirements.

LIMITED OFFICIAL USE

SPECIAL ADMINISTRATIVE MEASURES (SAM)

Page 6

Pursuant to 28 C.F.R. § 501.3

Inmate - Tsarnaev, Page 6

patch through telephone calls, or any other communications, to or from the inmate.

- iii. **Translation of Inmate's Correspondence** - An attorney of record may only allow a federally approved interpreter/translator to translate the inmate's correspondence as necessary for attorney-client privileged communication.
- c. **Attorney-Client Privileged Visits** - Attorney-client privileged visits may be contact or non-contact, at the discretion of the USMS/BOP/DF.
- d. **Attorney May Disseminate Inmate Conversations** - The inmate's attorney may disseminate the contents of the inmate's communication to third parties for the sole purpose of preparing the inmate's defense – and not for any other reason – on the understanding that any such dissemination shall be made solely by the inmate's attorney, and not by the attorney's staff.
- e. **Unaccompanied Attorney's Precleared Paralegal(s) May Meet With Client** - The inmate's attorney's precleared paralegal(s) may meet with the inmate without the need for the inmate's attorney to be present. These meetings may be contact or non-contact, at the discretion of the USMS/BOP/DF.
- f. **Simultaneous Multiple Legal Visitors** - The inmate may have multiple legal visitors provided that at least one of the multiple legal visitors is the inmate's attorney or precleared paralegal. These meetings may be contact or non-contact, at the discretion of the USMS/BOP/DF. An investigator or interpreter/translator may not meet alone with the inmate.
- g. **Legally Privileged Telephone Calls** - The following rules refer to all legally privileged telephone calls or communications:
 - i. **Inmate's Attorney's Precleared Staff May Participate in Inmate Telephone Calls** - The inmate's attorney's precleared staff are permitted to communicate directly with the inmate by telephone, provided that the inmate's attorney is physically present and participating in the legal call as well.

LIMITED OFFICIAL USE

SPECIAL ADMINISTRATIVE MEASURES (SAM)

Page 7

Pursuant to 28 C.F.R. § 501.3

Inmate - Tsarnaev, Page 7

- ii. **Inmate's Initiation of Legally Privileged Telephone Calls** - Inmate-initiated telephone communications with his attorney or precleared staff are to be placed by a USMS/BOP/DF staff member and the telephone handed over to the inmate only after the USMS/BOP/DF staff member confirms that the person on the other end of the line is the inmate's attorney. This privilege is contingent upon the following additional restrictions:
- (1) The inmate's attorney will not allow any non-precleared person to communicate with the inmate, or to take part in and/or listen to or overhear any communications with the inmate.
 - (2) The inmate's attorney must instruct his or her staff that:
 - (a) The inmate's attorney and precleared staff are the only persons allowed to engage in communications with the inmate.
 - (b) The attorney's staff (including the attorney) are not to patch through, forward, transmit, or send the inmate's calls, or any other communications, to third parties.
 - (3) No telephone call/communication, or portion thereof, except as specifically authorized by this document:
 - (a) Is to be overheard by a third party.⁴
 - (b) Will be patched through, or in any manner forwarded or transmitted, to a third party.
 - (c) Shall be divulged in any manner to a third party, except as otherwise provided in Section 2.d. above.

⁴ For purposes of the SAM, "third party" does not include officials of the USMS/BOP/DF, FBI, DOJ, or other duly authorized federal authorities when acting in connection with their official duties. This section does not allow monitoring of attorney-client privileged communications.

LIMITED OFFICIAL USE

SPECIAL ADMINISTRATIVE MEASURES (SAM)

Page 8

Pursuant to 28 C.F.R. § 501.3

Inmate - Tsarnaev, Page 8

- (d) Shall be in any manner recorded or preserved.⁵ The inmate's attorney may make written notes of attorney-client privileged communications.
 - (4) If the USMS/BOP/DF, FBI, or USA/DMA determines that the inmate has used or is using the opportunity to make a legal call to speak with another inmate or for any other non-legal reason that would circumvent the intent of the SAM, the inmate's ability to contact his attorney by telephone may be suspended or eliminated.
- h. **Documents Provided by Attorney to Inmate** - During a visit, the inmate's attorney may provide the inmate with, or review with the inmate, documents related to his defense, including discovery materials, court papers (including indictments, court orders, motions, etc.), and/or material prepared by the inmate's attorney, so long as any of the foregoing documents are translated, if translation is necessary, by a precleared interpreter/translator. Any documents not related to the inmate's defense must be sent to the inmate via general correspondence and will be subject to the mail provisions of subparagraphs 2.i. and 3.g. Documents previously reviewed and cleared for receipt by the inmate, and already in the inmate's possession at the outset of the visit, may be discussed or reviewed by the inmate and the inmate's attorney during the visit.
 - i. None of the materials provided may include inflammatory materials, materials inciting violence, military training materials, or materials that may be used to pass messages from inmate to inmate, unless such materials have been precleared by the USA/DMA and FBI.
 - ii. The USA/DMA may authorize additional documents to be presented to the inmate. If any document not listed or described above needs to be transmitted to the inmate, consent for the transmission of the document may be obtained from the USA/DMA without the need to formally seek approval for an amendment to the SAM.

⁵ Except by the USMS/BOP/DF, FBI, DOJ, or other duly authorized federal authorities. This section does not allow monitoring of attorney-client privileged communications.

SPECIAL ADMINISTRATIVE MEASURES (SAM)

Page 9

Pursuant to 28 C.F.R. § 501.3

Inmate - Tsarnaev, Page 9

- i. **Legal Mail⁶** - The inmate's attorney may not send, communicate, distribute, or divulge the inmate's mail, or any portion of its contents (legal or otherwise), to third parties.

In signing the SAM acknowledgment document, the inmate's attorney and precleared staff will acknowledge the restriction that only inmate case-related documents will be presented to the inmate, and that neither the attorney nor his or her staff will forward third-party mail to or from the inmate.

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

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

- i. The inmate is limited to non-legally privileged telephone calls with his immediate family members.⁷
- ii. The quantity and duration of the inmate's non-legally privileged telephone calls with his immediate family members shall be set by the USMS/BOP/DF, with a minimum of one call per month.

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

- i. Is to be overheard by a third party.
- ii. Is to be patched through, or in any manner forwarded or transmitted, to a third party.
- iii. Shall be divulged in any manner to a third party.

⁶ "Legal mail" is defined as properly marked correspondence (marked "Legal Mail") addressed to or from the inmate's attorney. All other mail, including that otherwise defined by the USMS/BOP/DF as Special Mail, shall be processed as "non-legal mail."

⁷ The inmate's "immediate family members" are defined as the inmate's (USMS/BOP/DF- or FBI-verifiable) spouse, children, parents, and siblings. Requests for additional non-legal contacts may be submitted and will be considered on a case-by-case basis.

SPECIAL ADMINISTRATIVE MEASURES (SAM)

Page 10

Pursuant to 28 C.F.R. § 501.3

Inmate - Tsarnaev, Page 10

- iv. Shall be in any manner recorded or preserved.⁸

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

- c. **Telephone SAM Restriction Notifications** - For all non-legally privileged telephone calls to the inmate's immediate family member(s):
 - i. The USMS/BOP/DF shall inform the inmate of the telephone SAM restrictions prior to each telephone call.
 - ii. The USMS/BOP/DF shall verbally inform the inmate's immediate family member(s) on the opposite end of the inmate's telephone communication of the SAM restrictions. The USMS/BOP/DF is only required to notify the inmate's communication recipient in English.
 - iii. The USMS/BOP/DF shall document each such telephone notification.
- d. **Family Call Monitoring** - All calls with the inmate's immediate family member(s) shall be:
 - i. Contemporaneously monitored by the FBI.
 - ii. Contemporaneously recorded (as directed by the FBI) in a manner that allows such telephone calls to be analyzed for indications the call is being used to pass messages soliciting or encouraging acts of violence or other crimes, or to otherwise attempt to circumvent the SAM.
 - iii. A copy of each inmate/immediate family member telephone call recording shall be provided by the USMS/BOP/DF on a single, individual cassette tape or compact disk (per call) for forwarding to the FBI. These recordings shall be forwarded on a call-by-call basis as soon as practicable.

⁸ Except by the USMS/BOP/DF, FBI, DOJ, or other duly authorized federal authorities.

SPECIAL ADMINISTRATIVE MEASURES (SAM)

Page 11

Pursuant to 28 C.F.R. § 501.3

Inmate - Tsarnaev, Page 11

- e. **Improper Communications** - If telephone call monitoring or analysis reveals that any call or portion of a call involving the inmate contains any indication of a discussion of illegal activity, the soliciting or encouraging of acts of violence or terrorism, or actual or attempted circumvention of the SAM, the inmate shall not be permitted any further calls to his immediate family members for a period of time to be determined by the USMS/BOP/DF. If contemporaneous monitoring reveals such inappropriate activity, the telephone call may be immediately terminated.
- f. **Non-legal Visits** -
 - i. **Limited Visitors** - The inmate shall be permitted to visit only with his immediate family members. The visitor's identity and family member relationship to the inmate will be confirmed by the USMS/BOP/DF and FBI in advance.
 - ii. **English Requirement** - All communications during non-legal inmate visits will be in English unless a fluent USMS/BOP/DF- or FBI-approved interpreter/translator is readily available to contemporaneously monitor the communication/visit. Arranging for an interpreter/translator may require at least fourteen (14) days' advance notice.
 - iii. **Visit Criteria** - All non-legal visits shall be:
 - (1) Contemporaneously monitored by the USMS/BOP/DF and/or FBI, in a manner that allows such visits to be analyzed for indications the visit is being used to pass messages soliciting or encouraging acts of violence or other crimes, or to otherwise attempt to circumvent the SAM.
 - (2) Permitted only with a minimum of fourteen (14) calendar days' advance written notice to the USMS/BOP/DF facility where the inmate is housed.
 - (3) Without any physical contact. All such meetings shall be non-contact to protect against harm to visitors or staff.

LIMITED OFFICIAL USE

SPECIAL ADMINISTRATIVE MEASURES (SAM)

Page 12

Pursuant to 28 C.F.R. § 501.3

Inmate - Tsarnaev, Page 12

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

- g. **Non-legal Mail** - Non-legal mail is any mail not clearly and properly addressed to/from the inmate's attorney and marked "Legal Mail" (incoming or outgoing). Non-legal mail is limited to only the inmate's immediate family, U.S. courts, federal judges, U.S. Attorneys' Offices, members of U.S. Congress, the BOP, or other federal law enforcement entities.
 - i. **General correspondence with limitations** - Correspondence is restricted to immediate family members. The volume and frequency of outgoing general correspondence with immediate family members may be limited to three pieces of paper (not larger than 8½" x 11"), double-sided, once per calendar week to a single recipient, at the discretion of the USMS/BOP/DF. The identity and family member relationship to the inmate will be confirmed by the USMS/BOP/DF and FBI.
 - ii. **General correspondence without limitations** - There is no volume or frequency limitation on correspondence to/from U.S. courts, federal judges, U.S. Attorneys' Offices, members of U.S. Congress, the BOP, and other federal law enforcement entities, unless there is evidence of abuse of these privileges, threatening correspondence is detected, circumvention of the SAM is detected, or the quantity to be processed becomes unreasonable to the extent that efficient processing to protect the security, good order, or discipline of the institution, the public, or national security may be jeopardized.
 - iii. All non-legal mail shall be -
 - (1) **Copied** - Shall be copied (including the surface of the envelope) by the warden, or his or her designee, of the facility in which the inmate is housed.
 - (2) **Forwarded** - Shall be forwarded, in copy form, to the location designated by the FBI.
 - (3) **Analyzed** - After government analysis and approval, if appropriate, the inmate's incoming/outgoing non-legal mail shall be forwarded

LIMITED OFFICIAL USE

SPECIAL ADMINISTRATIVE MEASURES (SAM)

Page 13

Pursuant to 28 C.F.R. § 501.3

Inmate - Tsarnaev, Page 13

to the USMS/BOP/DF for delivery to the inmate (incoming), or directly to the addressee (outgoing).

- iv. The federal government shall forward the inmate's non-legal mail to the USMS/BOP/DF for delivery to the inmate or directly to the addressee after a review and analysis period of:
 - (1) A reasonable time not to exceed fourteen (14) business days for mail that is written entirely in the English language.
 - (2) A reasonable time not to exceed sixty (60) business days for any mail that includes writing in any language other than English, to allow for translation.
 - (3) A reasonable time not to exceed sixty (60) business days for any mail where the federal government has reasonable suspicion to believe that a code was used, to allow for decoding.
- v. **Mail Seizure** - If outgoing/incoming mail is determined by the USMS/BOP/DF or FBI to contain overt or covert discussions of or requests for illegal activities, the soliciting or encouraging of acts of violence or terrorism, or actual or attempted circumvention of the SAM, the mail shall not be delivered/forwarded to the intended recipient but referred to the FBI for appropriate action. The inmate shall be notified in writing of the seizure of any mail.

4. **Communication With News Media**

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

5. **Religious Visitation**

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

LIMITED OFFICIAL USE

SPECIAL ADMINISTRATIVE MEASURES (SAM)

Page 14

Pursuant to 28 C.F.R. § 501.3

Inmate - Tsarnaev, Page 14

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

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

- a. The inmate shall not be allowed to share a cell with another inmate.
- b. The inmate shall be limited within the USMS/BOP/DF's reasonable efforts and existing confinement conditions, from communicating with any other inmate by making statements audible to other inmates or by sending notes to other inmates.

7. **Cellblock Procedures**

- a. The inmate shall be kept separated from other inmates as much as possible while in the cellblock area.
- b. The inmate shall be limited, within the USMS/BOP/DF's reasonable efforts and existing confinement conditions, from communicating with any other inmate while in the cellblock area.

8. **Commissary Privileges**

The USMS/BOP/DF shall restrict access to commissary items or any other objects determined by the USMS/BOP/DF to be capable of being converted into dangerous instruments.

9. **Access to Mass Communications**

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

- a. **Publications/Newspapers -**
 - i. The inmate may have access to publications determined not to facilitate criminal activity or be detrimental to national security; the security, good order, or discipline of the institution; or the protection of the public. This

LIMITED OFFICIAL USE

SPECIAL ADMINISTRATIVE MEASURES (SAM)

Page 15

Pursuant to 28 C.F.R. § 501.3

Inmate - Tsarnaev, Page 15

determination is to be made by the USMS/BOP/DF, in consultation with the USA/DMA.

- ii. Sections of any publication/newspaper that offer a forum for information to be passed by unknown and/or unverified individuals, including but not limited to classified advertisements and letters to the editor, should be removed from the publications/newspapers prior to distribution to the inmate.
 - iii. If restricted by the USMS/BOP/DF rules, access to a publication will be denied. If acceptable, upon delivery, the USMS/BOP/DF will review the publication and make the initial determination. If the FBI's expertise is required, the publication will be forwarded to the FBI for review. The USMS/BOP/DF will also forward the publication to the FBI if translations are needed to make that determination. (In these cases, the FBI shall respond to the USMS/BOP/DF within fourteen (14) business days.) The inmate shall then have access to the remaining portions of the publications/newspapers deemed acceptable, in accordance with USMS/BOP/DF policy.
 - iv. In order to avoid the passing of messages/information from inmate to inmate, the inmate shall not be allowed to share the publication(s) with any other inmates.
- b. **Television and Radio** - The inmate is authorized to have television and radio viewing and listening privileges, in accordance with standard and applicable USMS/BOP/DF policies and procedures.
- c. **Termination or Limitation** - If the USMS/BOP/DF determines that mass communications are being used as a vehicle to send messages to the inmate relating to the furtherance of terrorist or criminal activities, the inmate's access may be limited or terminated for a period of time to be determined by the USMS/BOP/DF.

10. **Access to Books**

The inmate may have access to all books that do not facilitate criminal activity or present a substantial threat to national security or the security, discipline, or good order of the institution. This initial determination is to be made by the USMS/BOP/DF and, if the

LIMITED OFFICIAL USE

SPECIAL ADMINISTRATIVE MEASURES (SAM)

Page 16

Pursuant to 28 C.F.R. § 501.3

Inmate - Tsarnaev, Page 16

USMS/BOP/DF determines that the FBI's expertise is required, the book(s) will be forwarded to the FBI for review. In conducting its analysis, the FBI will determine whether the book advocates or promotes acts of terrorism or violence and/or whether access to the book by this particular inmate would pose a substantial threat to national security.

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

11. **Transfer of Custody**

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

CONCLUSION

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

With respect to telephone privileges, the SAM are reasonably necessary because of the high probability of calls to co-conspirators to arrange terrorist or criminal activities.

With respect to mail privileges, the SAM are reasonably necessary to prevent the inmate from receiving or passing along critically timed messages. Although I recognize that eliminating the inmate's mail privileges entirely may be an excessive measure except in the most egregious of circumstances, I believe that delaying mail delivery and allowing authorized personnel to examine a copy of the mail is sufficient at this time to adequately ensure that the mail is not used to deliver requests for, or to assist in, violent and/or terrorist activities. Under these procedures, the inmate can relate personal news to family members, even if delayed, but he may find it difficult or unwise to pass along restricted information.

To the extent that the use of an interpreter/translator is necessary, the government has the right to ensure that the interpreter/translator given access to the inmate is worthy of trust.

LIMITED OFFICIAL USE

SPECIAL ADMINISTRATIVE MEASURES (SAM)

Page 17

Pursuant to 28 C.F.R. § 501.3

Inmate - Tsarnaev, Page 17

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

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

SAM CONTACT INFORMATION

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

LIMITED OFFICIAL USE

Exhibit B

Affirmation

By signing below, I acknowledge receipt of the SAM restrictions document for **Dzhokhar Tsarnaev**, dated August 27, 2013. By signing the affirmation, I acknowledge my awareness and understanding of the SAM provisions and my agreement to abide by these provisions, particularly those that relate to contact between the inmate and his attorney and the attorney's staff. The signing of the affirmation does not serve as an endorsement of the SAM or the conditions of confinement, and does not serve to attest to any of the factors set forth in the conclusions supporting the SAM. However, in signing the affirmation, I acknowledge the restriction that neither I or my staff will forward third-party messages to or from the inmate.

[signature]

[printed name]

[date]

Exhibit C



U.S. Department of Justice

Carmen M. Ortiz
United States Attorney
District of Massachusetts

Main Reception (617) 748-3100

John Joseph Moakley United States Courthouse
1 Courthouse Way
Suite 9200
Boston, Massachusetts 02210

September 11, 2013

Miriam Conrad, Esq.
Federal Defender's Office
51 Sleeper Street, 5th Floor
Boston, MA 02210

Re: United States v. Dzhokhar Tsarnaev, Crim. No. 13-10200- GAO

Dear Miriam:

I am writing in connection with our recent conversation about the Special Administrative Measures in the above-captioned case. I have consulted with officials at FBI, BOP, NSD, and OEO about your concerns and believe the following clarifications and proposed amendments to the SAM should address them.

1) Section 2(d). You have informed us that you might cite the defendant's injuries as a mitigating factor at a future sentencing hearing in this case. Under those circumstances, we agree that your sharing the defendant's communications about his medical condition with his treating physician at Beth Israel constitutes preparation for the defense of the case. It will be necessary, however, for you to advise the treating physician that he may not share any communications from the defendant about the defendant's medical condition with anyone else except for the purpose of preparing the defense in this case.

2) Section 2(e, f). The SAM distinguishes between paralegals and defense investigators primarily because the former are normally full-time employees of the defense team and the latter are normally part-time contract workers. This distinction usually implies a difference in the level of training, supervision, and accountability associated with workers in each category. You have informed us that two of the FPDS investigators assigned to this case are in fact full-time employees with levels of training, supervision, and accountability commensurate with those of paralegals. Under those circumstances we are willing to amend the SAM to allow those two investigators the same privileges as paralegals, provided they submit to the same preclearance procedures. We are not, however, willing to amend the SAM to allow your third investigator, whom you have informed us is a contract worker, the same privileges as paralegals, regardless of the investigator's particular circumstances. We believe that bright-line rules facilitate

Miriam Conrad, Esq.
September 11, 2013
Page 2

compliance with the SAM and therefore are in everyone's best interests.

Please provide me with the names of the two full-time FPDS investigators so that they can be added to the SAM.

3) Section 2(h). BOP needs to review all materials brought into BOP facilities to ensure the safety and security of the institution, its inmates, and BOP personnel. The review is normally performed by an officer at the front desk. In the case of purported legal materials brought in by a member of an inmate's defense team, the review is only as extensive as needed to ensure that the materials are in fact legal materials. If the officer determines that the materials are in fact legal, he or she does not normally report on the contents of the materials to higher-level BOP officials (let alone to the prosecution team) except in extraordinary circumstances; the officers therefore effectively operate as a taint team.

If, however, an officer has a question about certain material, he or she may bring it to the attention of the supervising lieutenant, who may in turn seek guidance from other BOP personnel, including BOP attorneys. In addition, if BOP has reason to believe that members of the defense team have attempted to carry non-legal materials into the facility in violation of the SAM, they may bring that to the attention of the US Attorney's Office.

BOP notes that the family photographs the defense attempted to bring in to the defendant are not legal materials and therefore were prohibited from being delivered to him in this way by Section 2(h) of the SAM. Although family photos may seem harmless, the Section 2(h) prohibition on non-legal materials is a bright-line rule designed to be easy to enforce and obey. No non-legal materials should be carried in to the defendant by members of the defense team. Instead, they should be sent to the defendant through non-legal mail so that they can be screened by appropriate BOP personnel in the ordinary fashion.

4) Section 2(h). We are aware that discovery in this case includes materials described in Section 2(h)(I) of the SAM – such as writings that promote violent terrorist attacks on civilians, detailed instructions for making improvised explosive devices, and other inflammatory materials– that BOP normally would not permit inside a BOP facility. At the same time, we acknowledge the defendant's right to review evidence that might be used against him (or by him) in his case. To accommodate these competing concerns, we hereby confirm that all discovery materials in this case are precleared by the USA and FBI for review by the defendant.

5) Section 3(f)(iii)(4). The SAM reflects BOP the standard rule that legal and social visits may not be combined. If, however, the defense articulates a reason why a particular combined visit is necessary to the preparation of the defense, an exception to the rule for that particular visit may be made. BOP reserves the right to limit the number of exceptions. Any such visits will be deemed social visits and treated accordingly.

Miriam Conrad, Esq.
September 11, 2013
Page 3

6) Section 9(A)(i). The length of time it takes BOP personnel to screen publications such as newspapers and magazines varies and depends, among other things, on the volume of printed material the defendant receives. Normally, the review process takes no more than a few days.

I hope this letter addresses your concerns. If you wish to speak further about this matter, please do not hesitate to contact me.

Very truly yours,

CARMEN M. ORTIZ
United States Attorney

By: /s/ William D. Weinreb
William D. Weinreb
Nadine Pellegrini
Aloke S. Chakravarty
Assistant U.S. Attorneys

Exhibit D



U.S. Department of Justice

Carmen M. Ortiz
United States Attorney
District of Massachusetts

Main Reception (617) 748-3100

John Joseph Moakley United States Courthouse
1 Courthouse Way
Suite 9200
Boston, Massachusetts 02210

September 17, 2013

Miriam Conrad, Esq.
Federal Defender's Office
51 Sleeper Street, 5th Floor
Boston, MA 02210

Re: United States v. Dzhokhar Tsarnaev, Crim. No. 13-10200- GAO

Dear Miriam:

I am writing in response to our conversation on September 12, 2013, in which your requested clarification of certain issues regarding the SAM.

As you know, Section 2(h) of the SAM states that, "[d]uring a visit, the inmate's attorney may provide the inmate with, or review with the inmate, documents related to his defense," and that "[a]ny documents not related to the inmate's defense must be sent to the inmate via general correspondence and will be subject to the mail provisions of subparagraphs 2.i. and 3.g." In a letter to you dated September 11, 2013, regarding the SAM, we used the term "legal materials" as a synonym for "documents related to the defense," and I understand the use of that phrase has engendered concern. I am therefore writing to confirm that our use of the phrase "legal materials" was not meant to narrow the scope of permissible documents under Section 2(h). The defense team remains free to bring in during a visit with the defendant any documents related to his defense; documents unrelated to the defense must be sent to the inmate via general correspondence.

I understand that you were also concerned by the treatment of the family photographs that the defense recently attempted to bring in to the defendant. According to you, those photographs were in fact related to the defense of the case and thus should not have been barred under Section 2(h). As I explained to you on the phone, however, BOP has informed me that the member of the defense team who brought the documents to FMC-Devens told the officer at the front desk that the photos were not related to the defense. I hope you will agree that this particular matter is not worth the time or effort of further inquiry; suffice it to say that the defense team may bring photographs to the defendant so long as they are related to his defense.

Miriam Conrad, Esq.
September 17, 2013
Page 2

I hope this letter addresses your concerns. If you wish to speak further about this matter, please do not hesitate to contact me.

Very truly yours,

CARMEN M. ORTIZ
United States Attorney

By: /s/ William D. Weinreb
William D. Weinreb
Nadine Pellegrini
Aloke S. Chakravarty
Assistant U.S. Attorneys