UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
v.	)	Crim No. 13-CR-10200-GAO
DZHOKHAR TSARNAEV, Defendant.	)	

MOTION FOR LEAVE TO FILE MEMORANDUM AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS IN SUPPORT OF DEFENDANT'S MOTION TO VACATE SPECIAL ADMINISTRATIVE MEASURES

The American Civil Liberties Union Foundation of Massachusetts (ACLUM) respectfully moves for leave to file a proposed memorandum as amicus curiae (attached hereto as Exhibit A) in support of defendant Dzhokhar Tsarnaev's Motion to Vacate Special Administrative Measures ("SAMs") Imposed on Defendant and Defense Counsel. The reasons for this motion are as follows.

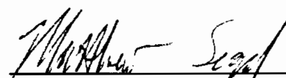
ACLUM is a non-profit, statewide membership organization that defends the civil rights and civil liberties established by the United States and Massachusetts Constitutions. ACLUM has a longstanding interest in protecting the attorney-client relationship and preserving the right to counsel enshrined in the Sixth Amendment of the United States Constitution and article 12 of the Massachusetts Declaration of Rights. See, e.g., Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228 (2004) (co-counsel challenging the low rate of compensation authorized for court-appointed counsel as a violation of defendants' constitutional right to counsel); Commonwealth v. Manning, 373 Mass. 438 (1977) (amicus challenging government's

government's intentional interference with attorney-client relationship). ACLUM has filed amicus briefs in many courts, including this Court. See, e.g., Br. of Amicus Curiae ACLU of Massachusetts, Blum v. Holder, No. 1:11-cv-12229-JLT (D. Mass. filed May 21, 2012).

In this case, ACLUM's amicus memorandum focuses specifically and exclusively on the provisions of the SAMs that relate to defense counsel. The attorney-client provisions of the SAMs are no trifling matter. They threaten Tsarnaev's Sixth Amendment rights because they require substantial expenditures of attorney time; they limit the information that Tsarnaev's attorneys can pass on from Tsarnaev to other people; and they give the Bureau of Prisons apparent authority to decide which documents defense attorneys can show Tsarnaev himself. The government understates the impact of these restrictions and overstates their justifications. ACLUM's memorandum seeks to clarify the legal analysis governing these provisions.

For these reasons, ACLUM respectfully requests that it be permitted to file its memorandum amicus curiae.

Respectfully submitted,



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Dated: November 5, 2013

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA v. DZHOKHAR TSARNAEV, Defendant.	Crim. No. 13-CR-10200-GAO

[PROPOSED] MEMORANDUM AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS IN SUPPORT OF DEFENDANT'S MOTION TO VACATE SPECIAL ADMINISTRATIVE MEASURES

INTRODUCTION

The attorney-client provisions of the Special Administrative Measures (SAMs) imposed on Dzhokhar Tsarnaev threaten his constitutional right to effective assistance of counsel in a potential death penalty case that is attracting worldwide attention.[1] These provisions are no trifling matter. They require substantial expenditures of attorney time; they limit the information that Tsarnaev's attorneys can pass on from Tsarnaev to other people; and they give the Bureau of Prisons apparent authority to decide which documents defense attorneys can show Tsarnaev himself. The government understates the impact of these restrictions and overstates their justifications. The American Civil Liberties Union Foundation of Massachusetts (ACLUM), as amicus curiae, submits this brief to clarify the legal analysis governing these SAMs.

Contrary to the government's description, the SAMs are not simply "inconvenient." Gov't Opp. 16-18. They trigger concerns under the Sixth Amendment because they may

[1] The amicus does not at this time express a view about other provisions of the SAMs. This brief addresses only the provisions of the SAMs that bear on the attorney-client relationship.

consume the defense attorneys' limited resources, chill their investigatory activities, and potentially expose their litigation strategy to the government. These consequences endanger the defense attorneys' ability to provide effective assistance of counsel. The threat imposed by the SAMs therefore raises a question of constitutional proportion rather than mere administrative inconvenience.

On the other side of the ledger, the government has not advanced a strong case for imposing these measures. Its alleged concerns are that Tsarnaev will incite criminal activity either by spreading a general message in support of jihad or else by attempting to pass specific messages to particular individuals. But the government's submissions offer, at best, tenuous support for these concerns, and even less support for the view that these concerns will be addressed by SAMs aimed at Tsarnaev's attorneys. For example, in applying for the SAMs and in opposing Tsarnaev's motion, the government mentions that Tsarnaev's mother might have sought sympathy by releasing to the media portions of a recorded phone call with Tsarnaev, see SAMs App. 2, and that two magazine articles have been written about him, see Gov't Opp. 7. These facts have little bearing on whether Tsarnaev will attempt to spread concrete, actionable messages, let alone whether his court-appointed attorneys would wittingly or unwittingly help him to do so.

As this Court has previously held, "pretrial strictures on a detainee cannot unduly burden [the detainee's] fundamental constitutional right to a vigorous defense by an independent attorney under the Sixth Amendment." United States v. Reid, 214 F. Supp. 2d 84, 92 (D. Mass. 2002). SAMs with attorney-client provisions have serious implications for the attorney-client relationship, and as such, should be imposed only when truly necessary. On this record, the proffered reasoning appears unlikely to overcome this threshold.

INTEREST OF THE AMICUS CURIAE

ACLUM is a non-profit, statewide membership organization that defends the civil rights and civil liberties established by the United States and Massachusetts Constitutions. ACLUM has a longstanding interest in protecting the attorney-client relationship and preserving the right to counsel enshrined in the Sixth Amendment of the United States Constitution and article 12 of the Massachusetts Declaration of Rights. See, e.g., Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228 (2004) (co-counsel challenging the low rate of compensation authorized for court-appointed counsel as a violation of defendants' constitutional right to counsel); Commonwealth v. Manning, 373 Mass. 438 (1977) (amicus challenging government's intentional interference with attorney-client relationship).

ARGUMENT

The SAMs in this case represent a substantial threat to the constitutional right to effective assistance of counsel. It is well established that the Sixth Amendment guarantees more than formal appointment: counsel must be able to play "a role that is critical to the ability of the adversarial system to produce just results." Strickland v. Washington, 466 U.S. 668, 685 (1984). For example, defense attorneys must undertake reasonable investigations and make independent strategic decisions. Id. at 686, 691; see Reid, 214 F. Supp. 2d at 92-94. "Unfettered communication between client and attorney lies at the very heart of the Sixth Amendment constitutional guarantee of the right to counsel". Reid at 89; see also United States v. Tsarnaev, No. 13-2106-MBB, 2013 WL 2156583, *2 (May 17, 2013, D. Mass) (unpub op.).[2]

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[2] The American Bar Association's comment on Rule 1.3, "Diligence," similarly instructs that "a lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication

The government violates this constitutional right "when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." Strickland, 466 U.S. at 687. The government cannot intrude on the "proper role of defense counsel" to "zealously [] defend [] to the best of their professional skill." Reid, 214 F. Supp. 2d at 94. Avoiding such intrusion is particularly important during pre-trial proceedings. "[T]o deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." Maine v. Moulton, 474 U.S. 159, 170 (1985); see also Wolfish v. Levi, 573 F.2d 118, 133 (2d Cir. 1978), r'vd on other grounds, Bell v. Wolfish, 441 U.S. 520 (1989) ("Indeed, one of the most serious deprivations suffered by a pretrial detainee is the curtailment of his ability to assist in his own defense."). Likewise, courts safeguard Sixth Amendment rights with additional vigor when the death penalty may be imposed. See, e.g., United States v. Ayala-Lopez, 327 F. Supp. 2d 138, 144 (D.P.R. 2004); Basciano v. Matinez, No. 07-CV-421, 2007 WL 2119908, *11 (E.D.N.Y. May 25, 2007) (unpub op.).

Evaluated against this backdrop, the SAMs represent more than a mere "inconvenience" for the defense attorneys. Instead, they threaten the ability of defense counsel to fulfill their constitutional obligations to provide effective assistance. Properly weighted, the government's sparse reasoning seems unlikely to justify this significant consequence.[3]

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to the interests of the client and with zeal in advocacy upon the client's behalf." Model Rules of Prof'l Conduct R. 1.3 cmt. 1.

[3] Contrary to the government's argument, this Court need not apply an exhaustion requirement. The government does not point to any First Circuit cases applying such a requirement to motions challenging the constitutionality of specific SAMs, and it concedes that other courts have refused to do so. Gov't Opp. 5. Although some courts have reached the alternative conclusion, the courts that have not applied an exhaustion requirement have the better argument. See, e.g., United States v. Hashimi, 621 F. Supp. 2d 76, 84-86 (S.D.N.Y. 2008) (a pre-trial detainee's motion challenging the constitutionality of specific SAMs does not require exhaustion before the Board of Prisoners because the Prison Litigation Reform Act does not govern such an action); Ayyad v. Gonzales, No. 05-02342, 2008 WL 203420, *3 (D. Colo. Jan. 17, 2008) (same); see also United

I. The SAMs in this case bear on the attorney-client relationship and therefore trigger serious Sixth Amendment concerns.

SAMs that limit defense counsel's ability to communicate with third parties and to share documents with clients raise several concerns that implicate the right to effective assistance of counsel. Those concerns are present in this case.

A. Attorney-client provisions in SAMs can trigger Sixth Amendment concerns.

To begin, even if it is possible for an attorney to comply with SAMs imposed by the government, compliance can "consume an inordinate amount of time with respect to otherwise ordinary communications between lawyer and client." 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, 87 (2008). What is more, defense attorneys must often expend additional resources challenging the SAMs. Id. at 86. As a consequence, "the lawyer's attention and energy are often diverted from the critical task of preparation with and for the client." Id. In short, every moment a lawyer spends complying with or challenging SAMs is a moment not devoted to the merits of her client's case. Id.

A separate set of concerns relates to the chilling effect that SAMs can exert on defense counsel. The broad scope of these restrictions, coupled with their often ambiguous terms, makes perfect compliance difficult to achieve. Id. at 88; Laura Rovner & Jeanne Theoharis, Preferring Order to Justice, 61 Am. U.L. Rev. 1331, 1373 (2012). Fears about potential prosecution for even unintentional errors are not far-fetched, particularly in the wake of attorney Lynne

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States v. Savage, No. 07-550-03, 2010 WL 4236867, *6-7 (E.D. Pa. Oct. 21, 2010). "There is nothing in either the language of the PLRA or its legislative history to suggest that Congress intended to strip district courts of the ability to effectively manage their criminal cases." Id. at *7. Particularly in a possible death penalty case, it "makes little sense" to "require Defendant to spend time pursuing administrative remedies before [the court] can resolve issues that necessarily bear on Defendant's ability to receive a fair trial." Id.

Stewart's conviction on charges relating to her alleged violation of SAMs. As this Court has recognized, "whatever the merits of [the Stewart] indictment, its chilling effect on those courageous attorneys who represent society's most despised outcasts cannot be gainsaid." Reid, 214 F. Supp. 2d at 95. This well-founded fear can trigger two different reactions, each of which raises constitutional concerns.

First, the specter of criminal prosecution can discourage members of the defense bar from taking on controversial cases. See, e.g., Marjorie Cohn, The Evisceration of the Attorney-Client Privilege in the Wake of September 11, 2001, 71 Fordham L. Rev. 1233, 1252-53 (2003). According to the co-chair of the national security committee of the National Association of Criminal Defense Lawyers, SAMs have "created a process to weed out qualified defense counsel." Rovner & Theoharis, Preferring Order to Justice, at 1374.

Second, even when defense attorneys take on (or are appointed to) cases that could involve SAMs, fear of prosecution can lead to self-censorship. Because a misstep could land the attorney in jail, attorneys might avoid, perhaps unconsciously, certain lines of inquiry that they would otherwise pursue. See, e.g., Tamar R. Birckhead, The Conviction of Lynne Stewart and the Uncertain Future of the Right to Defend, 43 Am. Crim. L. Rev. 1, 11-12 (2006). This hesitancy to defend a client zealously "inalterably jeopardize[s] the attorney-client relationship." Id. at 12. As Lynne Stewart herself observed:

> [T]he fear, to me, is not the people who will say, "No I won't do those cases," which may also be an outgrowth – but the people who will do the cases, but will now do them with an eye over their shoulder to make sure that they're doing [them] the way the government thinks that the case should be done. In other words, no challenge, no client-centered defense will take place if you're thinking all the time, "What am I going to do if they indict me like they did Lynne Stewart."

Rovner & Theoharis, Preferring Order to Justice, at 1374-75.

Recognizing these serious implications, courts have ordered the modification of attorney-client provisions in SAMs to better protect an attorney's constitutional duty to make independent decisions. See, e.g., United States v. Mikhel, 552 F.3d 961, 963-65 (9th Cir. 2009) (ordering modification to allow attorneys to use a translator and to authorize investigators to meet with client alone, and affirming voluntary modification to allow investigators to disseminate the contents of defendant's communications to third parties, in order to remove "an unacceptable burden on [the defendant's] due process and Sixth Amendment rights"); United States v. Savage, No. 07-550-03, 2012 WL 424993, *7-*9 (E.D. Pa. Feb. 10, 2012) (unpub op.) (ordering modification to authorize investigators to meet with client alone and to allow investigators to disseminate the contents of defendant's communications to other members of defense team for the purposes of preparing for trial or sentencing on constitutional grounds); United States v. Ujaama, No. CR02-283R (W.D. Wash. Dec. 12, 2002) (unpub. protective order) (imposing a protective order that relaxed restrictions placed on prison visits and telephone calls by attorneys and expanded the types of materials the attorneys could share with the defendant in the face of a Sixth Amendment challenge); see also Basciano v. Lindsay, 530 F.Supp.2d 435, 450 (E.D.N.Y. 2008) (acknowledging serious constitutional concerns when government action restricts attorney's ability to prepare a defense and inviting "defense counsel to continue to keep the court apprised of their efforts to confer with their client efficiently and effectively. If problems persist, defense counsel should so advise the court so that the conditions under which Basciano is confined can be adjusted to facilitate his access to counsel.").

B. The attorney-client provisions in these SAMs trigger similar constitutional concerns.

The attorney-client provisions imposed by the SAMs in this case are no different. As a threshold matter, they require abundant expenditure of attorney time; Tsarnaev's counsel has had

to learn, comply with, and challenge these SAMs. Cf. Dratel, Ethical Issues in Defending a Terrorism Case, at 86. Given that these attorneys are under time pressure to make submissions to the Justice Department concerning its decision about whether to seek the death penalty, the delays and distractions occasioned by the SAMs might be especially damaging to the Sixth Amendment in this case.

In addition, two specific provisions, 2(d) and 2(h), are particularly troubling. Provision 2(d) mandates that "[t]he 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." This provision neither defines the key phrase "for the sole purpose of preparing the inmate's defense," nor does it identify who gets to do so. It is entirely consistent for Tsarnaev's lawyers to challenge the vagueness of these terms while also, as the government puts it, "admit[ing] in [the] next breath that it is difficult for defense counsel to conceive why they would ever disseminate Tsarnaev's communications for any other reason." Gov't Opp. 15-16. Although defense lawyers may know what communications they consider to be part of the defense, there is no guarantee that their point of view will be shared by the government. Cf. Rovner & Theoharis, Preferring Order to Justice, at 1373. This is particularly so because these SAMs do not explicitly allow discussions regarding mitigation, which are critical in a potential death penalty case.

For example, a defense lawyer advocating against the application of the death penalty might need to seek mitigating evidence from the client's family members. Defense attorneys might conclude that passing along information from the client—even information that is itself unlikely to be presented as part of a case in mitigation—might advance the defense because it

might help to establish a rapport with the family members whose help is needed. But will prosecutors agree that such information has been disseminated "for the sole purpose of preparing the inmate's defense"? Will a judge? And what happens to the defense attorneys if their view is rejected? Do they lose their law licenses? Do they go to prison?

Given Lynne Stewart's conviction, fears regarding the repercussions of such potential disagreement are not "invent[ed] hypothetical problems"; they are very real. Gov't Opp. 16. And the possibility that defense lawyers could alter their strategy in light of these fears is not simply "burdensome"; it is a problem of constitutional magnitude. Gov't Opp. 16.

Provision 2(h) exacerbates this problem. It holds that attorneys can share documents with their client only if they are "related to his defense." According to the government, Bureau of Prisons (BOP) personnel will review documents to ensure compliance with this provision. But such compliance consumes even more of attorney resources and, much like provision 2(d), again leaves attorneys to wonder who will define the key terms. Faced with this ambiguity, defense attorneys could feel pressure to avoid sharing certain documents with their client. The government's suggestion that defense attorneys are "free to [] seek clarification" does not cure this concern, because doing so could force defense attorneys to disclose elements of their strategy. Gov't Opp. 17. This undermines "the ability of counsel to make independent decisions about how to conduct the defense." Strickland, 466 U.S. at 687; see also Reid, 214 F. Supp. 2d at 94 ("The independent bar . . . is a bar truly independent of the government.").

Finally, BOP's review of documents for compliance with provision 2(h) seems like a more invasive undertaking than the standard screening for contraband. Cf. Gov't Opp. 17-18. While standard screening focuses on physical items, review under provision 2(h) would appear to require a closer examination of content. Thus, even if the BOP ultimately deems all reviewed

documents related to the defense, its review presents the attorneys with the Hobbesian choice of either potentially revealing their litigation strategy to the government or withholding certain documents from their client. This is not "purely a claim of inconvenience," Gov't Opp. 16-17, but rather a claim that cuts to the heart of the Sixth Amendment.

II This Court should carefully consider whether the SAMs' attorney-client provisions are an unexaggerated response that is rationally related to a legitimate governmental purpose.

The SAMs' substantial threat to the attorney-client relationship must, of course, be balanced against the government's reasons for imposing them. Although there are different articulations of the balancing test, ultimately they all look to whether there is a (1) legitimate government interest (2) that is rationally related to the challenged restrictions (3) which is not an exaggerated response. Turner v. Safley, 482 U.S. 78, 89-98 (1987); Bell v. Wolfish, 441 U.S. 520, 550-51 (1979).[4] The government overstates both the legitimacy of its interests and the connection of those interests to the SAMs' attorney-client provisions.

[4] Bell and Turner describe their balancing tests slightly differently. Under Bell, "when an institutional restriction infringes a specific constitutional guarantee . . . the practice must be evaluated in light of the central objective of prison administration, safeguarding institutional security." Additionally, "[i]n evaluating the constitutionality of conditions or restrictions of pretrial detention that implicates only the protection against deprivation of liberty without due process of law," Bell instructs courts to determine whether the restriction "is reasonably related to a legitimate governmental objective." 441 U.S. at 535, 539. Under Turner, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." This evaluation includes an analysis of four factors, including whether there is "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." 482 U.S. at 89. These variations have led some courts to state that they are applying one test or the other—indeed, the First Circuit traditionally applies Bell to restrictions imposed on pretrial detainees. Roberts v. Rhode Island, 239 F.3d 107, 109-10 (1st Cir. 2001); Tsarnaev, 2013 WL 2156583 at *2. For purposes of this motion, however, what is most critical is that both tests require analyzing whether the restriction is a rational, unexaggerated response related to a legitimate interest. Bell, 441 U.S. at 550-51, 555; Turner, 482 U.S. at 89, 91, 93, 97-8.

A. Where constitutional rights are at stake, courts conduct an independent analysis that requires actual evidence of the specific interest involved and its rational relationship to the challenged restriction.

A court's review of SAMs bearing on the attorney-client relationship is far more rigorous than the government suggests. The amicus urges this Court to consider three key points before applying the balancing test to the specific facts of this case.

First, although the government encourages this Court to apply "an extremely deferential standard," Gov't Opp. 12-13, the deference afforded to correctional officials is by no means absolute, particularly when constitutional rights are at stake:

> [W]here, as here, a prisoner alleges that a particular provision restriction imposed upon him by the prison officials impinges upon his exercise of constitutionally guaranteed rights, it is incumbent upon [courts] to carefully scrutinize the effect of the restrictions. It is clear that ready access to the courts is one of, perhaps the fundamental constitutional right.

Johnson-El v. Schoemehl, 878 F.2d 1043, 1051 (8th Cir. 1989) (quoting Cruz v. Hauck, 475 F.2d 475, 476 (5th Cir. 1973). Consistent with that admonition, courts have readily modified government restrictions that are not rationally related to a legitimate government interest or that represent an exaggerated response to that interest. See, e.g., Roberts v. Rhode Island, 239 F.3d 107, 110-13 (1st Cir. 2001); Mikhel, 552 F.3d at 963-65; Savage, 2012 WL 424993 at *7-*9. Indeed, where there is a dearth of evidence to support the need for a specific restriction, and the right to counsel is at issue, courts have invalidated such a restrictions as "an unacceptable burden on [a defendants] due process and Sixth Amendment rights." Mikhel, 552 F.3d at 963; cf. Basciano, 530 F. Supp. 2d at 450.

Second, the government must provide specific evidence that its interest is legitimate within the context of a given case. This showing must include concrete facts, and cannot merely rely on the defendant's belief system or general feelings about committing crimes. See, e.g.,

Roberts, 239 F.3d at 110-13 (analyzing facts at Rhode Island Depart of Corrections to determine whether government interest in initiating body cavity search was legitimate at that particular institution); Basciano, 530 F. Supp. 2d at 446-48 (analyzing "whether the Government has offered sufficient evidence that Basciano is in fact a danger to others" to determine whether the government interest in restricting Basciano's interaction with others was legitimate in that particular case). A high burden of proof is generally required to legitimize a concern that a detainee poses a threat to others. For example, Basciano affirmed the legitimacy of the government's concern that the defendant was a danger to others only after it "offered evidence not of a single such instance, but rather of a pattern of discussions and actions that suggest an intent to cause harm to individuals and conduct criminal activity from inside the prison walls," including evidence that he both authorized a murder and discussed a plot to kill the Assistant United States attorney while in jail. 530 F. Supp. 2d at 440-42, 446-47. The court emphasized that this "ample evidence" was critical to its holding. Id. at 447; see also United States v. Felipe, 148 F.3d 101, 111-12 (2d Cir. 1998) (evidence that ordered murder of six individuals from jail cell); Savage, 2012 WL 424993, *4 ("Not only has Defendant threatened to kill witnesses and their families, he has also vowed to kill correctional officers, FBI agents and Bureau of Prison staff, often describing his intentions in vivid detail.").

Third, even if the government's stated purpose is legitimate, "the question remains whether the government's response is rationally related to th[is] purpose." Basciano, 530 F. Supp. 2d 448-50. This analysis is distinct from, and as important as, the first line of inquiry; courts have ordered the modification of SAMs where the government was able to establish a legitimate interest but failed to show "a rational relationship between th[e] SAMs restriction and its legitimate penological concern." Savage, 2012 WL 424993 at *8.

B. The government's submissions are unlikely to establish a legitimate interest that is rationally connected to the attorney-client provisions in the SAMs.

Here, the government's attempt to justify the SAMs relies on two categories of interests: first, a fear that Tsarnaev will inspire jihad through general messages to the public, and second, a fear that Tsarnaev will pass specific operational messages to particular individuals to incite criminal acts. Gov't Opp. 6-11. On this record, neither interest is likely to justify the threat that the SAMs pose to the Sixth Amendment.

In support of both of its stated interests, the government mentions: (1) a message Tsarnaev wrote prior to his arrest, (2) Tsarnaev's alleged pre-arrest request to his friends to remove evidence from his room, (3) the fact that Tsarnaev destroyed a cell phone prior to his arrest, (4) Tsarnaev's mother's release of a recorded phone conversation with her son to the media and (5) several articles that were written after Tsarnaev's arrest without his input. Gov't Opp. 6-9. This submission is relatively sparse in comparison to cases that have upheld the legitimacy of a fear that a detainee poses a threat to others. Basciano, 530 F. Supp. 2d at 440-42, 446-47; Felipe, 148 F.3d at 111-12; Savage, 2012 WL 424993 at *4. On this record, neither of the government's stated interests seems likely to withstand the balancing test.

With respect to the government's claim that Tsarnaev will spread a generalized pro-terrorism message, there is scant support for the suggestion that Tsarnaev is seeking to spread such a message from inside prison. The only message that Tsarnaev affirmatively communicated to the public occurred prior to his arrest. There is no indication that he had knowledge of, let alone requested, the release of his telephone conversation with his mother or the publication of the magazine articles. Even if this does constitute sufficient evidence to legitimize a concern that Tsarnaev will spread a generalized message (which seems doubtful), it still bears no relationship to the attorney-client provisions of the SAMs. If anything, this fear goes to limiting Tsarnaev's

interactions with the media, not his attorneys' trial preparation. A fear that Tsarnaev will inspire jihad through a general message to the public is thus unlikely to justify a restriction on his attorneys' ability to communicate.

With respect to the government's claim that Tsarnaev will foment crime by passing specific operational messages to particular individuals, it is unclear how Tsarnaev could possess the wherewithal to pass along actionable information or instructions from inside prison. Although the government correctly observes that past behavior can supply evidence of a defendant's likely future course of action, Gov't Opp. 5-6, none of the past behaviors discussed by the government suggest that Tsarnaev is an ongoing threat to anyone. To the contrary, this evidence suggests that every person who is suspected of committing crimes with Tsarnaev is either dead or charged with a crime.

Moreover, the government's submissions do not establish a link between the SAMs' attorney-client provisions and the government's interest in preventing Tsarnaev from communicating with third parties. There is no evidence that Tsarnaev's court-appointed attorneys would either wittingly or unwittingly convey criminal messages to third parties on his behalf.[5] Without this showing, there appears to be a fatal "lack of logical connection between this SAMs restriction and the Government's interest in restricting Defendant's ability to communicate." Id.

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[5] None of the cases cited by the government regarding the transmission of secret messages involved the use of attorneys to do so. Gov't Opp. 11; see Turner v. Safely, 482 U.S. 78 (1987) (prisoner-to-prisoner communication); United States v. Salameh, 152 F.3d 88 (2d Cir. 1998) (direct communication between inmate and co-conspirator on a monitored jail telephone); United States v. Johnson, 223 F.3d 65 (7th Cir. 2000) (general reference to direct communication between inmates and other individuals via telephone or during visits); United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004) (general reference to individuals' ability to speak in code). Instead, they simply stand for the proposition that individuals sometimes use code to convey messages to one another. Without more, these cases do not support the government's assertion that restricting the attorneys' communications is rationally related to preventing Tsarnaev's ability to pass messages to third parties.

CONCLUSION

Especially when faced with government arguments about security concerns, courts must steadfastly protect the constitutional rights of detainees. Nowhere is this role more vital than with respect to the detainee's right to effective assistance of counsel, as "all other rights of an inmate are illusory without it". Adam v. Carlson, 488 F.2d 619, 630 (7th Cir. 1973); see also Arruda v. Fair, 547 F. Supp. 1324, 1335 (D. Mass. 1982) (same). "Pretrial detainees have a substantial due process interest in effective communication with their counsel and in access to legal materials. When this interest is inadequately respected during pre-trial confinement, the ultimate fairness of their eventual trial can be compromised." Johnson-El, 878 F.3d at 1051. To protect both the constitution and public safety, the amicus asks this Court to consider both the important rights that these SAMs imperil and the weaknesses of the government's rationale for imposing them.

Respectfully submitted,

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Dated: November 5, 2013

Certificate of Service

I hereby certify that on November 5, 2013, a true copy of the above document was served by first-class mail and by email upon the attorney of record for each other party as follows:

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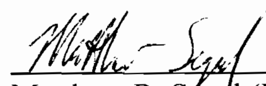

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