UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES	:	
	:	
v.	:	
	:	**Criminal No. 09-0466(BMC)**
JOAQUÍN GUZMÁN LOERA,	:	
	:	
Defendant.	:	

DEFENDANT'S OPPOSITION TO GOVERNMENT'S MOTION FOR AN ANONYMOUS AND PARTIALLY SEQUESTERED JURY

DEFENDANT Joaquín Guzmán Loera ("Guzman"), by and through undersigned counsel, respectfully submits his Opposition to Government's Motion for an Anonymous and Partially Sequestered Jury.

INTRODUCTION

Relying on a multitude of internet articles, uncorroborated and untested "evidence" and at least seven self-serving *ex parte* filings that Mr. Guzmán has no way of rebutting, the government asks this Court to empanel for trial an anonymous and partially sequestered jury. The government claims that Mr. Guzmán's "history of interference with the judicial process," "means to harm the jury," and the "widespread media coverage" surrounding this case are reasons for this Court to grant its Motion. Such an order would unduly burden Mr. Guzmán's presumption of innocence, impair his ability to conduct meaningful *voir dire* and create the extremely unfair impression that he is a dangerous person from whom the jury must be protected.

ARGUMENT

THE FACTS AND CIRCUMSTANCES OF THIS CASE DO NOT PRESENT "STRONG REASON TO BELIEVE THE JURY NEEDS PROTECTION" AND, THEREFORE, THE MOTION MUST BE DENIED.

From the outset, the government has been determined to gain advantage by sensationalizing this case. The centerpiece of this case is a more than 25-year long "continuing criminal enterprise" and a narcotics conspiracy as charged in the fourth superseding indictment filed in 2016. The government argues that Mr. Guzmán is the "principal leader of the Mexico-based international drug trafficking organization known as the Sinaloa Cartel, one of the world's largest and most prolific drug trafficking organizations." Gov. Mot. at 2. Notwithstanding the thousands of pieces of discovery produced by the government, the principal source of "evidence" against Mr. Guzmán will be numerous cooperating witnesses who will testify at trial in exchange for reduced prison sentences. The government relies on those same witness to justify the empanelment of an anonymous and partially sequestered jury.

Empaneling an anonymous jury in this case would unfairly burden Mr. Guzmán's presumption of innocence and should be rejected in favor of less extreme measures to protect the privacy of jurors. An anonymous jury – especially one that would be permitted to function only under armed guard – would poison the atmosphere of the case and serve to bolster the government's proof by creating the impression that Mr. Guzmán is guilty and dangerous. In a case in which the government alleges that Mr. Guzmán committed acts of violence, juror anonymity sends the message to each juror that he or she needs to be protected from Mr. Guzmán. From there, members of the jury could infer that Mr. Guzmán is both dangerous and guilty. Granting the government's Motion would deny Mr. Guzmán the fair trial guaranteed by

the United States Constitution.

A. An anonymous jury may not be empaneled in the absence of "strong reason to believe the jury needs protection," because empaneling an anonymous jury burdens the presumption of innocence and impairs Mr. Guzmán's ability to conduct meaningful *voir dire*.

The empaneling of an anonymous jury is an unusual and drastic measure that is justified only when the government establishes that it is "genuinely called for." *United States v. Vario*, 943 F.2d 236, 239 (2d Cir. 1991); *United States v. Thai*, 29 F.3d 785, 801 (2d Cir. 1994). The Second Circuit has repeatedly and consistently held that this deviation from standard methods of jury-selection is permissible only under circumstances where there is a convincing showing by the government of "strong reason to believe the jury needs protection." *United States v. Thomas*, 757 F.2d 1359, 1365 (2d Cir. 1985). Without this predicate showing, an anonymous jury may not be empaneled.

In assessing whether a jury truly "needs protection," and that, therefore, an anonymous jury is "genuinely called for," the Court has emphasized that, "An obstruction of justice charge, particularly one involving jury-tampering, has always been a crucial factor in our decisions regarding anonymous juries." *Vario*, 943 F.2d at 240; *see, e.g., United States v. Tutino*, 883 F.2d 1125, 1132-33 (2d Cir. 1989). Here, although the government alleges obstruction of justice, it has not charged Mr. Guzmán with such obstruction. Nevertheless, the Court in *Vario* also cautioned, "[t]he invocation of words such as 'organized crime,' 'mob,' and 'the Mafia,' [or as in this case, "cartel"] unless there is something more, does not warrant an anonymous jury." *Vario*, 943 F.2d at 241. Even those cases require "something more." As stated in *Vario*:

> Before a district judge may rely on the organized crime connection of a defendant as a factor in the question of anonymous juries, he must make a determination

> that the connection has some direct relevance to the question of juror fears or safety in the trial at hand beyond the innuendo that this connection conjures up.

Id. The reason a decision to impanel an anonymous jury may come only after a strong showing of its necessity is that the practice places a burden on two important interests: the presumption of innocence and the defendant's interest in conducting a meaningful *voir dire*. As stated in *United States v. Amuso*, 21 F.3d 1251, 1264 (2d Cir. 1994), in considering a motion for an anonymous jury, a court "must balance the defendant's interest in conducting a meaningful *voir dire* and in maintaining the presumption of innocence against the jury's interest in remaining free from real or threatened violence and the public interest in having the jury render a fair and impartial verdict." Courts do not reach the balancing test, however, without a credible and convincing predicate showing from the government that there is, in fact, "strong reason to believe the jury needs protection . . . ." defined as a finding that there is "a serious threat to jury safety . . . ." *Thomas*, 757 F.2d at 1364-65, quoted with approval in *Amuso*, 21 F.3d at 1264; *see also*, *United States v. Wong*, 40 F.3d 1347, 1376 (2d Cir. 1994) ("Empaneling an anonymous jury undoubtedly has serious implications for a defendant's interest in effectively conducting *voir dire* and in maintaining the presumption of innocence.") In *United States v. Ross*, 33 F.3d 1507 (11th Cir. 1994), the Court summarized the risks of an anonymous jury as follows:

> Unquestionably, the empanelment of an anonymous jury is a drastic measure, one which should be undertaken only in limited and carefully delineated circumstances. An anonymous jury raises the specter that the defendant is a dangerous person from whom the jurors must be protected, thereby implicating the defendant's constitutional right to a presumption of innocence.

Ross, 33 F.3d at 1519; *see also*, *Commonwealth v. Angiulo*, 615 N.E.2d 155, 172 (Mass. 1993) ("[T]he empanelment of an anonymous jury triggers due process scrutiny because the practice is likely to taint the jurors' opinion of the defendant, thereby burdening the presumption of

innocence.")

In *Thomas*, the Court considered the impact on a defendant's presumption of innocence of the practice of empaneling an anonymous jury:

> The elementary principle that a shield of innocence surrounds a defendant on trial reached back in history at least to early Roman law. Recognition of this principle and its enforcement are part of the foundation of our system of criminal justice. A particular practice – here the impaneling of an anonymous jury – and its impact on the presumption of innocence must therefore receive close judicial scrutiny and be evaluated in the light of reason, principle and common sense.

Thomas, 757 F.2d at 1363. Because of the importance of the interests that are burdened by the practice, an anonymous jury "is a measure that should be taken only with care." *United States v. Bellomo*, 954 F.Supp. 630, 654 (S.D.N.Y. 1997) (Granting application where government presented "substantial evidence that suggests a threat to the judicial process in this case," *id*. at 655). *See United States v. Millan-Colon*, 834 F.Supp. 78 (S.D.N.Y. 1993) (Denying application for anonymous jury); *United States v. Melendez*, 743 F.Supp. 134, 135 (E.D.N.Y. 1990) (Denying "drastic remedy of an anonymous jury"); *United States v. Coonan*, 664 F.Supp. 861, 862 (S.D.N.Y. 1987) (Denying anonymous jury in the absence of evidence that the defendants – notwithstanding the fact they were charged with "predicate acts including murder, attempted murder, kidnapping, loansharking, extortion, and narcotics trafficking as part of a racketeering enterprise known as the Westies" – were likely to interfere with the judicial process).

As the above cited cases suggest, empaneling an anonymous jury in this case burdens Mr. Guzmán's presumption of innocence. The point of the cases that have upheld the practice on particular facts is that the factual setting justifies the burden placed on the rights of the defendant. In this case, the government has not set forth such a factual setting beyond

internet articles, untested and suspect statements from cooperators seeking to reduce their own sentences and several self-serving *ex parte* proffers to the Court.

B. The government's request to have the jury transported to and from the courthouse, and maintained under guard while at the courthouse, not only burdens the presumption of innocence but creates the unfair impression that Mr. Guzmán is a dangerous person from whom the jury must be protected.

The government proposes that the jurors must be escorted, guarded, and isolated from the public wherever they go, presumably while constantly accompanied by armed agents of the government. In the absence of the "strong showing" of an actual need for protecting the jury, this aspect of the motion should also be denied. Indeed, these measures may in and of themselves engender fear on the part of jurors. In *Millan-Colon*, 834 F.Supp. 78 (S.D.N.Y. 1993), the court noted that the Court's simple directive that jurors eat lunch in the jury room caused one juror to ask, "'[A]re our lives in danger?'" This prompted the court to observe that "[i]ronically, the very relief that the government now seeks, which includes sequestering the jury at all recesses, is likely to engender fear on the jurors' part that they are in danger." 834 F.Supp. at n.3. Highly unusual measures, such as those requested by the government, send a clear message to the jury that they are in danger from Mr. Guzmán and that the Court has decided that jury safety cannot be assured otherwise.

Mr. Guzmán reiterates that none of these risks may be placed in the constitutional balance absent the predicate showing of very good reasons to believe the jury actually needs protection. This two-step process may not be conflated into a single amorphous "balancing test." That much the case law makes clear.

C. This case does not present the criteria that justify empanelment of an anonymous or otherwise "protected" jury.

1. Alleged pattern of violence

It cannot be the case that simply saying that Mr. Guzmán is charged with a "pattern of violent activity" warrants empanelment of an anonymous jury. If every federal trial in which the government alleged gang and/or narcotics related murders warranted an anonymous jury, such proceedings would become the rule rather than the exception. Instead, as the cases require, the "something more" which must be proven, must always involve proof of a credible threat that Mr. Guzmán is likely to attempt to interfere with the jury itself.

Name calling and aspersion casting, as the government does here, especially when based on unproven allegations, fails to pass muster. The argument that the nature of the charges in the indictment warrant an anonymous jury requires the belief that those charges are true. In this case, most of the allegations in the indictment rely on uncorroborated testimony by cooperators whose veracity has never been subjected to any examination. Similarly, the government has for the seventh time submitted self-serving *ex parte* allegations to the Court supposedly detailing Mr. Guzmán's so-called history of violence. Most certainly, those one-sided allegations are based on the same cooperators on whose testimony the government bases the indictment.

The government also relies on internet and news articles to support its argument. For example, the government argues:

> Moreover, the government is aware that dangerous individuals, seemingly not under the defendant's direction and control, have indicated a desire and willingness to assist the defendant. For instance, public reporting has indicated

> that a group of federal prisoners in California released a video shortly after the defendant's extradition in which they stated that they were the "hitmen who are going to take care of [the defendant]" and, in a message apparently directed to the defendant, stated "everything is ready for you. What you say is the law. Here you have more than 3,500 soldiers."

Gov. Mot. at 6. The government then mentions Mr. Guzmán's "vast network of criminal associates." *Id*. This allegation is nothing short of a bad joke. That some masked "wannabe soldiers" decide to make a video and mention Mr. Guzmán has absolutely nothing to do with whether the jury in this case needs to be anonymous or sequestered. Every example of Mr. Guzmán's purported ability to "harm the jury" is believed to have taken place in Mexico, not the United States and certainly not this District. Unlike "Mafia" cases, where the alleged criminal organization is local and has an actual ability to harm jurors, Mr. Guzmán's alleged structure – if any - was located in Mexico.

Mr. Guzmán has been in the United States for over a year under extremely restrictive conditions imposed by the government. Mr. Guzmán cannot have any non-legal visits except from his six-year-old twin daughters. The visits are monitored by government agents. He can only make two 15-minute telephone calls per month to his sister and mother. These calls are also monitored by government agents. He is prevented from passing any messages to third parties. In fact, during one visit with his daughters, the monitoring agent interrupted the visit and told Mr. Guzmán that he could not tell his daughters to give his greetings to their mother. There simply is no way that Mr. Guzmán could engage in any kind of jury tampering even if he so desired. In short, the government cannot put forth any credible evidence that Mr. Guzmán has the actual current ability to harm jurors in this case. Similarly, the government cannot put forth any credible evidence that any "associates" are similarly positioned to do so.

2. Corruption of the judicial process

The government also argues that Mr. Guzmán has engaged in obstruction of justice. More specifically, the government alleges that Mr. Guzmán "employed armed guards and assassins who engaged in murders, assaults, kidnappings, and torture against both potential drug trafficking rivals and potential witnesses and those suspected of providing assistance to law enforcement authorities." Gov. Mot. at 2 – 3. None of these allegations have ever been proven to anyone. In fact, they are based on the untrustworthy and uncorroborated word of cooperators who have traded their "information" for the promise of reduced sentences.

Again, as with the alleged acts of violence, all the alleged acts of "obstruction of justice" are believed to have taken place in Mexico. Unless the government has proof that Mr. Guzmán has corrupted staff at the Metropolitan Correctional Center, gotten them to agree to harm the jury or somehow impinge upon the judicial process in this case, the government's allegations are meaningless and should not be considered by this Court.

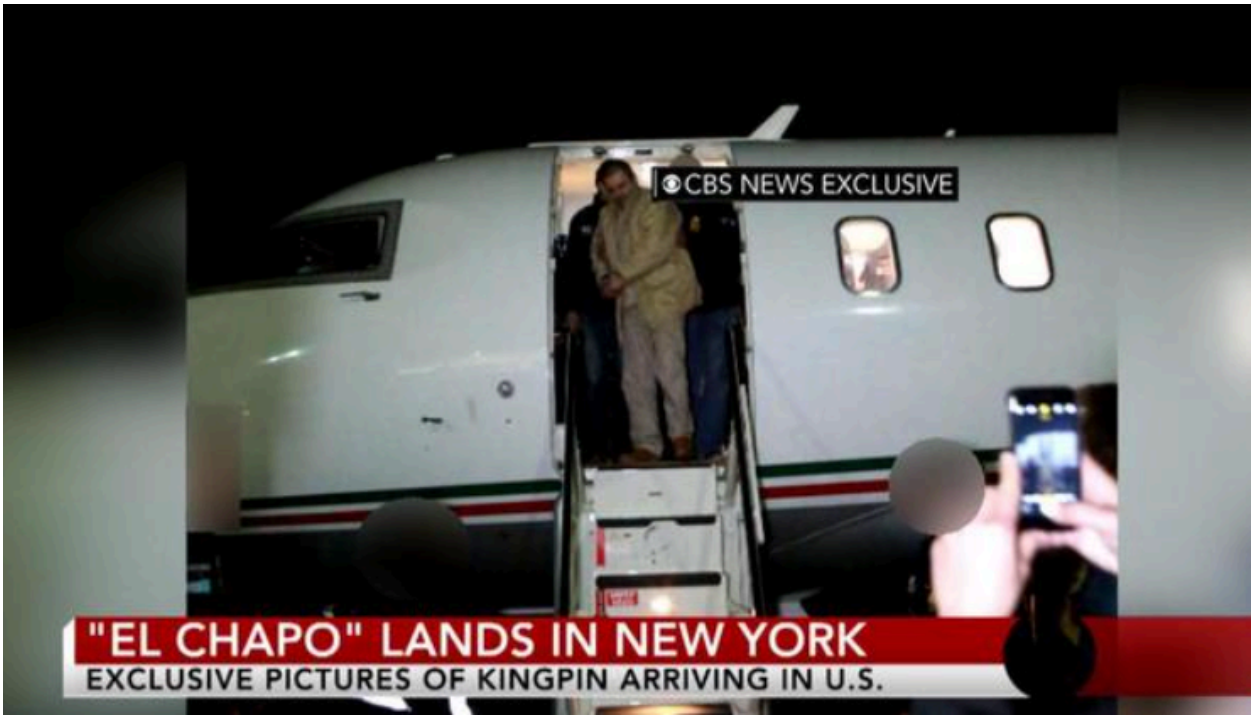
3. Level of publicity

The government argues that media attention could affect juror impartiality but makes no factual claim regarding why this would be so. On the contrary, it is the specter of the anonymous jury itself that most threatens juror impartiality because of the potential to taint the jurors' opinions about Mr. Guzmán. The interference with the presumption of innocence is a far more serious and realistic consequence than the highly speculative claim that jurors, contrary to their oaths and to the instructions of this Court, would be influenced by media attention.

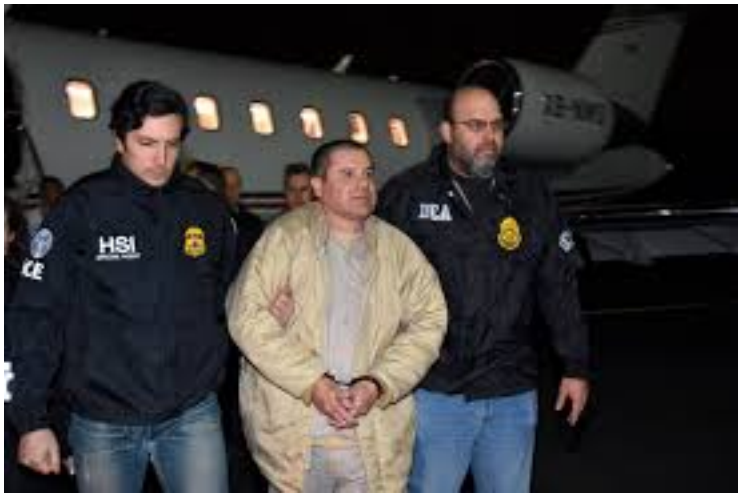
As noted previously, it is the government, not the defense, that has sought to gain advantage by sensationalizing this case. As cogently stated by predecessor counsel:

> Upon arrival at MacArthur Airport in Long Island, Mr. Guzman's flight was met by members of the press, who were permitted to photograph Mr. Guzman both as he was escorted off of the plane in handcuffs while flanked by law enforcement officers and inside a hangar at the airport. This orchestrated event served no legitimate law enforcement function and ran afoul of the Code of Federal Regulations (and also belies the government's proclaimed security concerns.)
>
> On January 20, 2017, before Mr. Guzman's arraignment on the Superseding Indictment, the government filed a 56-page detention memorandum. At the time of the filing, the government was aware that the chance that Mr. Guzman would apply for release on that day was non-existent and that they would be given ample time to make their position on bail known should the need arise. Despite the government's protestations to the contrary, there is little doubt that the detention memorandum was intended primarily as a press release which could only serve to prejudice Mr. Guzman and taint the pool of potential jurors.
>
> Further, immediately following Mr. Guzman's arraignment, Robert Capers, the then-United States Attorney for the Eastern District of New York, hosted a forty-nine minute press conference in which he and other law enforcement personnel went far beyond merely commenting on the charges in the Indictment. This press conference was also in clear contravention of the Code of Federal Regulations. During the event, Mr. Capers likened Mr. Guzman to a "cancerous tumor" and commented that "the caliber of witnesses are strong and great …." The press conference video was not only posted on the website for the United States Attorney's Office for the Eastern District of New York, but appears to have been posted on Twitter and on YouTube by that Office, where it has been viewed more than two thousand times. An excerpted clip in which Mr. Capers compares Mr. Guzman to a cancerous tumor has been viewed close to 5,000 times. Video of the press conference remains widely available to the public on YouTube and various other media outlets. While sparing no detail in recounting the legend and myth of the notorious alleged narcotics trafficker "El Chapo" in their "detention memorandum" and extensive press conference, the government, of course, neglected to note the Joaquin Guzman has never been convicted of a narcotics trafficking offense or a violent crime.

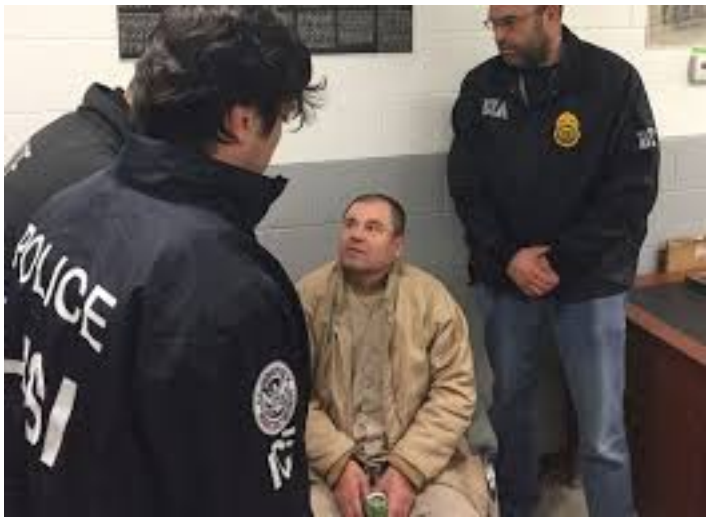
D.E. 50 at 2 – 3 (citations omitted). Some of the images facilitated by the government in a blatant attempt to influence a jury pool include the following:



Available at https://www.cbsnews.com/news/el-chapo-mexico-extradites-drug-lord-joaquin-guzman-to-us/. Also



Available at https://www.nbcnews.com/news/us-news/why-el-chapo-s-extradition-mexico-surprised-u-s-officials-n709856, and



Available at https://www.nbcnewyork.com/news/national-international/El-Chapo-Guzman-Extradition-United-States-411258985.html. It is painfully obvious that Mr. Guzmán did not alert the media to his arrival in this District. To compound the matter, the United States Attorney himself led the press conference where he continued the government's assault of Mr. Guzmán's due process rights.

Available at https://www.youtube.com/watch?v=4OcN5ZbGne8. So, not only did the government force Mr. Guzmán to take a public "perp walk" upon his arrival in the United States, but also the government possibly tainted the jury pool against him. If there is any risk of media attention unfairly tainting the jury, it is of the government's own doing and it inures to Mr. Guzmán's detriment.

To the extent that the Court feels it is necessary to keep the names of jurors from the public record, Mr. Guzmán does not object to a procedure that allows counsel to have access to the names and other information concerning the jurors while withholding that information from the public and Mr. Guzmán himself. In the prosecution of Martha Stewart, a true celebrity placed on trial in a case that was truly highly publicized, the trial judge, in an effort to protect potential jurors' privacy, closed the *voir dire* to the media. In reversing that ruling, the Second Circuit noted that the concerns for juror privacy could have been accomplished by "simply concealing the identities of the prospective jurors" from the media. *See ABC, Inc. v. Stewart*, 360 F.3d 90, 105 (2d Cir. 2004). The Court also noted that the trial judge in that case had entered an order "prohibiting the media from communicating with jurors or prospective jurors or with their family members until such time as that juror's or potential juror's service was completed." *Id*. at 94. Mr. Guzmán does not object to a similar order being entered in this case as expanded to include a prohibition from any person having contact with jurors. Nor does Mr. Guzmán object to the jury being informed of such a court order with instructions from the Court to report any violation of that order.

Finally, it is instructive to recall why an elevated level of pre-trial publicity is factored into the mix of circumstances that determine whether or not an anonymous jury should

be empaneled. As explained in *United States v. Vario*, 943 F.2d 236 (2d Cir. 1991):

> Pre-trial publicity may militate in favor of an anonymous jury because it can 'enhance the possibility that jurors' names would become public and thus expose them to intimidation by defendants' friends or enemies or harassment by the public.'

Vario, 943 F.2d at 240 (quoting *United States v. Persico*, 621 F.Supp. 842, 878 (S.D.N.Y. 1985) (emphasis added)). The defense's suggestion that jurors' names be withheld from the public record is a reasonable way to handle and such concerns. Additionally, the government cannot present credible evidence that Mr. Guzmán has the ability to harm the jury, thus rendering the request that the jury be escorted and guarded or made to meet at secret locations to be transported to and from the courthouse by armed Marshals unsupported.

4. Protection of Mr. Guzmán's Rights

The government claims that the Court can take "simple precautions to ensure that the relief requested by the government will not infringe upon" Mr. Guzmán's rights. Gov. Mot. at 17. It suggests that the Court can use a "jury questionnaire as well as thorough and probing *voir dire*" to preserve Mr. Guzmán's right to make informed choices during the jury selection process. *Id.* According to the government, Mr. Guzmán's right to be tried by jurors who are not prejudiced by reason of their anonymity can be preserved by the Court can informing the jury that "partial anonymity is being ordered to protect their privacy" and that "anonymity would allow them to feel comfortable in giving candid answers to the questions asked in *voir dire*." *Id.* at 18. The government's suggestions are facile.

As the government concedes, this case has and will receive intense media scrutiny. However, rather than cause problems for a potential jury, much of the media coverage

has created problems for Mr. Guzmán because it is almost universally unfavorable towards him. For example, Wikipedia calls him "a Mexican drug lord who headed the Sinaloa Cartel;[1] CNN calls him a "drug kingpin" and the "head of the Sinaloa Cartel;"[2] and Newsweek says that he is "Mexico's most powerful drug lord" and that "El Chapo was responsible for horrific violence."[3]

Such widespread and negative coverage of Mr. Guzmán is more reason to *not* have an anonymous jury. Although the use of jury questionnaires would be helpful in this case, an anonymous jury would prevent the parties from being able to thoroughly investigate and question the attitudes and prejudices of potential jurors. The almost universal use of social media platforms, where people often feel free to speak their minds, voice their opinions and air their prejudices is fertile ground for examination during *voir dire*. With an anonymous jury, such examination would be impossible because the parties would not know who to search for in social media platforms. According to a recent article, "the rate of jurors tweeting or posting comments on social media during trials is astoundingly high, according to a Reuters Legal article, and it has resulted in numerous new trials and overturned verdicts."[4] Cursorily asking *venire* members whether they can fairly decide the case solely on the evidence presented at trial invites problems down the line. There is simply too much negative publicity about Mr. Guzmán to ignore a treasure trove of information concerning potential jurors' prejudices and beliefs.

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[1] "Joaquín "El Chapo" Guzmán, WikipediA, available at: https://en.wikipedia.org/wiki/Joaqu%C3%ADn_%22El_Chapo%22_Guzmán.
[2] "Drug Kingpin 'El Chapo' Guzman to Undergo Psychological Exam in NY," CNN, available at: http://www.cnn.com/2017/11/08/us/ny-el-chapo-guzman-hearing/index.html.
[3] "El Chapo is Going Down. How Many Drug Lords, Assassins, Politicians and Policemen Will He Take With Him?, Newsweek (Oct. 19, 2017), available at: http://www.newsweek.com/2017/10/27/el-chapo-drug-lords-assassins-politicians-policemen-687773.html.
[4] "Social Media in the Courtroom," the balance (May 8, 2017), available at: https://www.thebalance.com/social-media-in-the-courtroom-2151359.

It is expected that during trial the government will request U.S. Marshals to maintain a heavily armed cordon of security around the courthouse. This, along with the expected heavily armed escort for jurors, clearly telegraphs to jurors that Mr. Guzmán is a dangerous man that merits such security. If that is so, the jurors could reasonably infer guilt from the mere "security" spectacle created by the government. The spectacle began when the government allowed the media to be present and take prejudicial pictures of Mr. Guzmán upon his arrival in the United States and more so when the government held the press conference where the United States Attorney himself publicly vouched for Mr. Guzmán's guilt.

Mr. Guzmán suggests that keeping the juror's identity from the public and media is a fair compromise. The Court can issue an order directing counsel not to share the information with Mr. Guzmán, the media or others not involved with jury selection. The Court can further issue an order prohibiting anyone from contacting jurors. Such an order will squarely address the concerns raised by the government's Motions.

It will not take much for jurors to figure out that the expected security cordon at the courthouse or the armed transport to and from the courthouse is for their safety, notwithstanding any admonition from the Court that "transportation is provided to protect their privacy and to ensure that the trial can proceed expeditiously." Gov. Mot. at 18. Thus, absent a countervailing and credible threat to jurors, the partial sequestration requested by the government will violate Mr. Guzmán's right to due process.

A hearing on the Government's unproven allegations is requested.

WHEREFORE, for the foregoing reasons and any other that may become apparent to the Court, Mr. Guzmán respectfully requests that the government's Motion be **DENIED**.

Dated: Washington, DC
January 23, 2018

Respectfully submitted,

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By: _____

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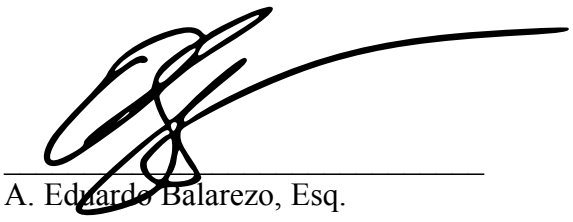
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of January 2018, I caused a true and correct copy of the foregoing Defendant's Opposition to Government's Motion for an Anonymous and Partially Sequestered Jury to be delivered via Electronic Case Filing to the parties in this case.



A. Eduardo Balarezo, Esq.