

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

-----X  
UNITED STATES OF AMERICA

-v.-

19-2239

JOAQUIN ARCHIVALDO GUZMAN LOERA,

DECLARATION

*Defendant-Appellant.*  
-----X

MARC FERNICH, a lawyer admitted to practice in this Court,  
declares under penalty of perjury per 28 U.S.C. § 1746:

1. I represent Joaquin Archivaldo Guzman Loera in the  
captioned appeal.

2. By this declaration, I respectfully request that the Court (a)  
accept the accompanying oversize brief of 245 pages and approximately  
48,000 words; (b) permit the brief's initial filing under seal; and (c) allow  
the filing of a deferred appendix.

**Oversize Brief**

3. Guzman, aka El Chapo, appeals drug, gun and money  
laundering convictions stemming from his alleged leadership of the  
Sinaloa Cartel, reputedly the world's largest and most powerful narcotics  
trafficking organization. His three-month Brooklyn federal trial before

Judge Cogan and a jury followed two-and-a-half years of pretrial litigation and generated a 7109-page transcript. Guzman is serving multiple life sentences in solitary confinement under highly restrictive Special Administrative Measures at the ADX supermax facility in Florence, CO.

4. Guzman's brief raises 10 claims of legal error, several including myriad sub-arguments. The brief, though long, has been edited as rigorously as I am presently able. But given the volume of the record, the number and complexity of the issues, and the magnitude of the stakes for my client, substantial extra space is needed to adequately present the material and provide effective representation in an extremely serious and complicated case.

### **Initial Sealing**

5. Significant proceedings below were conducted *ex parte* – and substantial portions of the record are redacted, sealed or both – due to stated security concerns. So as not to inadvertently include protected material in a public document, I respectfully request leave to file the brief under seal in the first instance. With the Court's permission, I will file redacted public copies in consultation with the government after a two-

week review period. I respectfully propose this timetable following discussion of the matter with the government. Meanwhile, I attach as Exhibit A the introductory portions of the brief – which I am confident contain no protected material – to give interested parties a roadmap of the appeal pending the redacted public filing.

**Deferred Appendix**

6. In the interest of efficiency, I further request leave to file both sealed and redacted public appendices at the time I file the redacted public brief, after the same consultation period and process with the government. See Fed. R. App. 30(c)(1); Local Rule 30.1(c). Due to law office failure – a miscommunication among myself and a colleague assisting me in compiling and preparing the appendix – I am unable to file sealed appendices this evening.

**WHEREFORE**, for the reasons stated, I respectfully ask the Court to accept the accompanying oversize brief, permit its initial filing under seal and temporarily defer filing of the appendix.

Dated: Brooklyn, NY  
Sept. 4, 2020



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MARC FEINICH

# 19-2239

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IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

*Appellee,*

v.

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

*Defendants,*

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

*Defendant-Appellant.*

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

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**BRIEF FOR DEFENDANT-APPELLANT  
JOAQUIN ARCHIVALDO GUZMAN LOERA**

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

*Attorney for Defendant-Appellant  
Joaquin Archivaldo Guzman Loera*

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## STATEMENT

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

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

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

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<sup>1</sup> See *U.S. v. Tsarnaev*, 968 F.3d 24, 35 (CA1 2020).

<sup>2</sup> *Boudin v. Thomas*, 533 F. Supp. 786, 787 (S.D.N.Y. 1982) (Duffy, J.).

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

### **QUESTIONS PRESENTED & REVIEW STANDARDS**

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

Prudential standing in this area is a legal issue reviewed *de novo*.<sup>3</sup>

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

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<sup>3</sup> *U.S. v. Barinas*, 865 F.3d 99, 104 (CA2 2017).

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

This question raises multiple sub-issues reviewed under shifting standards. The constitutionality of pretrial confinement conditions, and any supporting factual determinations, are subject to *de novo* and clear error review, respectively.<sup>4</sup> Protective orders issued under Fed. R. Crim.

P. 16 and the Classified Information Procedures Act are reviewed for abuse of discretion.<sup>5</sup> Whether excessive ex parte practice rises to a denial of procedural due process is a legal question reviewed *de novo*.<sup>6</sup>

Ultimately, whether all these hindrances in concert violated Guzman's Fifth and Sixth Amendment rights to due process, counsel, defense and fair trial turns on constitutional interpretation and application, an issue of law reviewed *de novo*.<sup>7</sup>

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<sup>4</sup> *U.S. v. El-Hage*, 213 F.3d 74, 79 (CA2 2000).

<sup>5</sup> *U.S. v. Aref*, 533 F.3d 72, 80 (CA2 2008).

<sup>6</sup> *U.S. v. Abuhamra*, 389 F.3d 309, 318 (CA2 2004) (citation omitted).

<sup>7</sup> *Ante* n.4.

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

Whether an indictment charges a cognizable crime, a matter of statutory interpretation, is a question of law reviewed *de novo*.<sup>8</sup>

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

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

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

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

<sup>10</sup> *Davis v. U.S.*, 140 S. Ct. 1060, 1061 (2020).

entails ineffective assistance of counsel, Guzman must show deficient performance and consequent prejudice.<sup>11</sup>

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

Legal rulings and factual findings on motions to suppress evidence are reviewed *de novo* and for clear error, respectively.<sup>12</sup>

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

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<sup>11</sup> *Strickland v. Wash.*, 466 U.S. 668 (1984).

<sup>12</sup> *Ante* n.9.



Evidentiary rulings are generally reviewed for abuse of discretion.<sup>13</sup>

A district court abuses its discretion when it makes an error of law.<sup>14</sup>

Evidentiary restrictions impacting constitutional rights, like those of confrontation and defense, are reviewed *de novo*.<sup>15</sup>

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

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

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

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<sup>13</sup> *U.S. v. Al-Farekh*, 956 F.3d 99, 114 & n.53 (CA2 2020).

<sup>14</sup> *U.S. v. Dupree*, 706 F.3d 131, 135 (CA2 2013).

<sup>15</sup> *Al-Farekh*, 956 F.3d at 114 & n.55.

<sup>16</sup> *U.S. v. Triana*, 205 F.3d 36, 42 (CA2 2000).

<sup>17</sup> *Mickens v. Taylor*, 535 U.S. 162, 168-69 (2002).

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

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

Evidentiary rulings are generally reviewed for abuse of discretion.<sup>18</sup>

A district court abuses its discretion when it makes an error of law.<sup>19</sup>

Evidentiary limitations affecting constitutional rights, like those of confrontation and defense, are reviewed *de novo*.<sup>20</sup>

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

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<sup>18</sup> *Ante* n.13.

<sup>19</sup> *Ibid.* n.14.

<sup>20</sup> *Ibid.* n.15.

<sup>21</sup> *U.S. v. Grote*, 961 F.3d 105, 114 (CA2 2020).

<sup>22</sup> *Ante* n.4.

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

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

The Court reviews this issue for abuse of discretion.<sup>23</sup>

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

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<sup>23</sup> *U.S. v. Stewart*, 433 F.3d 273, 295 (CA2 2006).

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

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

### **BACKGROUND**

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

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

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<sup>24</sup> *U.S. v. Brown*, 623 F.3d 104, 112-13 (CA2 2010).

<sup>25</sup> NOA

<sup>26</sup> J&C

<sup>27</sup> Ind.

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

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

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

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<sup>28</sup> *U.S. v. Guzman Loera*, 09-cr-0466 (BMC), 2019 WL 2869081, at \*1, \*15 (Jul. 3, 2019).

<sup>29</sup> *Ibid.*

<sup>30</sup> *See, e.g.*, ECF 275 at 8-8 (7/30/18); *id.* 419 at 6 (11/6/18).

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

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

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<sup>31</sup> T. 6442-43.

<sup>32</sup> *Ante* n.2.

## ARGUMENT SUMMARY

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

### Pretrial Issues

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

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

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

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

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



### Trial Issues

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

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

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

### Post-Trial Issues

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

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

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