

10-0865-CR(L)

10-0872-cr(CON)

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

BERNARD B. KERIK,

Defendant-Appellant.

*On Appeal from the United States District Court
for the Southern District of New York (White Plains)*

**REPLY BRIEF FOR DEFENDANT-APPELLANT
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TABLE OF CONTENTS

	Page
INTRODUCTION.....	1
I. THE STANDARD OF REVIEW IS NO BARRIER TO REVERSAL	2
II. THE ENHANCEMENT WAS FOR SPEECH, NOT CONDUCT.....	4
III. ENHANCING MR. KERIK’S SENTENCE DUE TO THE CRITICISM OF THE PROSECUTORS CANNOT BE JUSTIFIED BY A CLAIM THAT SUCH SPEECH WAS RELEVANT TO MR. KERIK’S SENTENCING.....	10
IV. THE JUDGE’S REMARKS ABOUT MR. KERIK’S FAILURE TO DISAVOW HIS SUPPORTERS’ SPEECH MAKE CLEAR THAT THE COURT PENALIZED MR. KERIK IN VIOLATION OF HIS FIFTH AMENDMENT RIGHTS.....	14
V. RESENTENCING SHOULD BE REQUIRED DUE TO THE ABSENCE OF NOTICE THAT THE JUDGE WOULD RELY ON THE CRITICISMS OF THE PROSECUTORS TO ENHANCE MR. KERIK’S SENTENCE.....	18
CONCLUSION.....	19
CERTIFICATE OF COMPLIANCE WITH RULE 32(A)	21

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Comm. v. Mills</i> , 436 Mass. 387 (2002)	13
<i>Dawson v. Delaware</i> , 503 U.S. 159 (1992).....	11, 12
<i>In re Oliver</i> , 333 U.S. 257 (1948).....	17
<i>Kapadia v. Tally</i> , 229 F.3d 641 (7th Cir. 2000).....	12
<i>Landmark Commc’n Inc. v. Virginia</i> , 435 U.S. 829 (1978).....	5
<i>O’Brien v. United States</i> , 376 F.2d 538 (1st Cir. 1967), <i>vacated on other grounds</i> , 391 U.S. 367 (1968).....	12
<i>United States v. Bakker</i> , 925 F.2d 728 (4th Cir. 1991).....	13
<i>United States v. Brown</i> , 479 F.2d 1170 (2d Cir. 1973)	13
<i>United States v. Cossey</i> , __ F.3d __, 2011 WL 257441 (2d Cir. Jan. 28, 2011).....	3
<i>United States v. Cruz</i> , 156 F.3d 366 (2d Cir. 1998)	15
<i>United States v. Hernandez</i> , 604 F.3d 48 (2d Cir. 2010)	9
<i>United States v. Kaba</i> , 480 F.3d 152 (2d Cir. 2007)	2, 9

United States v. Lemon,
723 F.2d 922 (D.C. Cir. 1983) 14

United States v. Oliveras,
905 F.2d 623 (2d Cir. 1990) 15

United States v. Sofsky,
287 F.3d 122 (2d Cir. 2002) 2, 4

INTRODUCTION

The government's response might be plausible if the sentencing transcript read differently than it does. But Judge Robinson's remarks do not allow the innocuous gloss that the government tries to apply to them. The transcript itself – which we excerpt at length in our opening brief and which this Court of course is free to read for itself – makes clear that, separate and apart from any concern about the protective-order violation, Judge Robinson was angry and upset that Mr. Kerik and his supporters had publicly criticized the prosecutors, and increased his sentence on that account.

The government's fallback position, that “it was entirely proper” for the District Court to “consider[] Kerik's own statements and views about the prosecutions or Modafferi's statements and views about the prosecution,” is similarly without merit. That is particularly so because much of the public criticism challenged the prosecutors' pursuit of the indictment's most serious charges, charges as to which Mr. Kerik has always maintained his innocence, charges that those same prosecutors later dropped, charges previously resolved in a prior prosecution and, above all, charges to which he never pleaded guilty. Such criticism

cannot serve as a legitimate basis for a sentencing enhancement, and this Court should vacate Mr. Kerik's sentence and remand for resentencing.¹

I. THE STANDARD OF REVIEW IS NO BARRIER TO REVERSAL

The government urges the Court to apply the most stringent form of plain error review. Resp. at 32-33. However, Mr. Kerik's appeal is limited to the sentencing context and involves the lack of notice about the premise for the challenged variance. Accordingly, a "relaxed" plain error standard applies in the absence of contemporaneous objections. See *United States v. Sofsky*, 287 F.3d 122, 125-26 (2d Cir. 2002); cf. *United States v. Kaba*, 480 F.3d 152, 158 (2d Cir. 2007) (a defendant

¹ We focus in this reply brief on the issues presented by the appeal, and therefore will not detail our disagreements with the government's Statement of Facts except where relevant to the sentencing issue, but one point demands comment. Whereas the Government correctly stated in its sentencing memorandum "that there is no allegation, nor is one made, that [Mr. Kerik] associated with individuals he knew in fact to be affiliated with organized crime." A754 (Gov't Sentencing Memorandum, at 45 n.24); see Br. at 5-6 n.5, it nonetheless chose to fill its brief with references to organized crime, mentioning the subject no fewer than six times in its Statement of Facts. See Resp. at 5-6, 8. We will not speculate about why the government made that drafting decision, but it bears repeating that there has never been any finding or even allegation that Mr. Kerik had any knowing interaction with any organized crime figures.

concerned about a judge's bias "might be understandably reluctant" to challenge a judge's remarks "just as the judge is about to select a sentence" (quoting *United States v. Leung*, 40 F.3d 577, 586 (2d Cir. 1994)).²

Moreover, the circumstances of this case readily satisfy plain error review. *Cf. United States v. Cossey*, ___ F.3d ___, 2011 WL 257441 at **4-5 (2d Cir. Jan 28, 2011) (on plain error review, vacating sentence and remanding for resentencing before a different judge where "it was unclear whether the district court, in sentencing, improperly relied" upon an impermissible factor and where appearance of the judge's fairness was seriously in doubt)). As discussed below, contrary to the government's argument, the sentencing judge's impermissible reliance on constitutionally protected speech to enhance Mr. Kerik's sentence is an error that is indeed plain on the transcript's face. And given the sharp increase in the sentence, there is no sound basis to suggest that

² Whether under these circumstances a contemporaneous objection was required or even possible, moreover, is subject to doubt. The trial judge offered his ruminations and then, at the end, imposed a sentence above the stipulated range. The imposition of the sentence is what constituted the violation of Mr. Kerik's rights.

this personal outrage did not affect Mr. Kerik's substantial rights. *See id.*; *Sofsky*, 287 F.3d at 125 n.2.³

II. THE ENHANCEMENT WAS FOR SPEECH, NOT CONDUCT

The sentencing transcript shows that Judge Robinson was personally offended by the suggestion in Modafferi's articles that the government had acted in bad faith with respect to its treatment of Mr. Kerik. *See* Br. at 20-23; A211, A580-81, A582; SPA 16-17, A875-76; SPA51-52, A910-11. The government offers a strained reading of that same transcript to argue that the judge's remarks were a kind of code for Mr. Kerik's violation of the protective order. *See, e.g.*, Resp. at 37-39. But the record does not support that argument.

³ Additionally, as the Government concedes, plain error review is independently satisfied where the error "seriously affected the fairness, integrity or public reputation of judicial proceedings." Resp. at 43 (quotation marks and citation omitted). Judge Robinson's many remarks during the course of this case, which included public denunciations of Mr. Kerik, musings about his own financial circumstances in comparison to those of Mr. Kerik and his lawyers, and statements strongly suggesting that the judge took personal offense at the criticism of the prosecutors, easily satisfy that standard. Therefore, despite the government's efforts to downplay Judge Robinson's behavior, resentencing is warranted to preserve the appearance of impartiality. *See* Br. at 39-45.

The District Court identified “the comments about the prosecutors” as a significant and independent basis from “the failure to abide by court orders” for increasing the sentence:

I have said it before but I want it to be clear. What the guideline calculation even – doesn’t even pretend to take into account is what’s happened in the context of this piece of litigation; *the comments about the prosecutors*; the failure to abide by court orders that caused me to send Mr. Kerik to jail, because I did not believe I could trust that he would going forward comply with court orders, and that matters, even to literally a few months ago.

SPA 52-53 (emphasis added). The factors are distinct – the “comments about the prosecutors” in the published articles did not violate any court order.⁴ Thus, Judge Robinson early in the sentencing hearing said this:

⁴ There was no protective order barring Mr. Kerik or his supporters from criticizing the prosecutors, nor, we submit, could there have been one consistent with the Constitution in this case. See Br. at 26-32. There were no findings in the record that the commentary in Modafferi’s articles on obscure websites “constitute[d] a clear and present danger to the administration of justice” and that the danger was not merely “remote or even probable.” *Landmark Comm’n Inc. v. Virginia*, 435 U.S. 829, 844 (1978) (citing *Craig v. Harney*, 331 U.S. 367, 376 (1947)). All the record shows with respect to Modafferi’s prior articles is that the Judge Robinson found the criticism personally offensive. See, e.g. Br. at 16-18, 20-23.

In the course of this prosecution, as you well know, *a lot of things* happened that troubled me greatly. *One of them* is Mr. Kerik, through individuals, maligned the prosecutors and implied that they were doing this prosecution for reasons other than they had a good faith and reasonable basis to believe that these crimes had been committed, and had on his website, on the fundraising website for him and in other areas, things that were put out in order to make it seem like these prosecutors were doing this for their own personal aggrandizement and for reasons other than the fact that they had a good faith basis to believe he did what they alleged he did.

And so, the implication of that is, “the prosecutors are bad guys. I’m really the good guy, because I’m really innocent of all this, and they are only doing this for their own personal gain.” So that troubled me. Troubles me greatly for a person from law enforcement to do that, troubles me to no end.

Another aspect of what’s happened in this litigation is that there throughout was – let me, let me step back and be clear.

I am never suggesting for one second that any defendant needs to admit their guilt, doesn’t have an absolute right to maintain their innocence throughout the proceeding and put the Government to every bit of their proof, absolutely, I believe in that.

What is troubling to me, though, is in the course of this litigation – and we have been through some issues with this, at this late stage, right – we had Mr. Kerik, in my view, ignoring orders of this Court. I sent him to jail for it. And, so, it is

hard for me to get a full and clear picture of this person who in many respects is a hero, and let me sincerely say, I believe that. I said to you, I believed that long before today. But on the other end of that was willing to violate the law, was willing to do things that obstructed investigations into those violations, were willing to do things – was willing to do things that made it appear as though he were innocent and the prosecutors were really the bad guys for actually pursuing this, *and then*, in my view violated the orders of this court.

SPA16-17 (emphases added). There is only one natural reading of Judge Robinson's remarks: one thing that bothered him was the criticism of the prosecutors, and another was the violation of court orders. He believed that Mr. Kerik wrongly disparaged the prosecutors, and that *after that* he violated orders of the court.

That was evident the third time Judge Robinson addressed the issue, as well:

As I have mentioned earlier, and I won't belabor it, but to imply that this whole prosecution is the work of individuals who were seeking to do this for their own personal gain and aggrandizement, when Mr. Kerik understood that he was actually guilty of at least some of the charges he was being charged with. He never stopped those acts. He never disavowed them.

He participated in this – in these actions to make it seem as though he were innocent of these

charges and that the people who were doing their job were somehow inappropriate in their actions. “I am innocent and therefore why are they doing this?” And there were even articles that appeared through his website implying that the prosecutors were using this so that they can go out and make money.

SPA 51. The substance of the articles – not one of which was a product of the confidentiality breach – is what evoked the court’s ire.

The government’s post-hoc efforts to rehabilitate the transcript fail. For example, the government repeatedly invokes the issue of attempts to influence the jury pool, but not once during the lengthy proceeding did Judge Robinson mention jury-influence in connection with Mr. Kerik’s sentence. The government also tries to explain the district court’s remarks as comments about “Kerik’s motive for violating the Protective Order.” Resp. at 42. But there is no support whatsoever for that in the transcript. And, as noted above, the government’s overall suggestion that it was only the violation of the protective order that motivated Judge Robinson to enhance the sentence simply does not hold water.

There is, in short, no reason not to take Judge Robinson at his word that the fact that the prosecutors were “maligned” “trouble[d]

[him] to no end.” SPA16. That conclusion finds further support in the court’s comments at the proceedings leading up to the bail revocation. There Judge Robinson blasted as “scurrilous,” “outrageous,” and “lying” the article by Modafferi about disparate treatment of Democratic and Republican nominees and the supposed “ultimatum” delivered to Mr. Kerik – an article that was published long before Mr. Modafferi’s improper disclosure to the *Washington Times* and had nothing to do with the breach of the protective order. *See, e.g.*, Br. at 16-19.

At minimum, the transcript raises serious doubt about whether the judge relied on an constitutionally impermissible basis for the variance. Accordingly, resentencing is warranted. *See Kaba*, 480 F.3d at 157-58 (applying relaxed plain error review to a sentencing error where judge’s comments suggested reliance on a constitutionally invidious factor, even in the absence of actual bias against the defendant); *see also United States v. Hernandez*, 604 F.3d 48, 56 (2d Cir. 2010) (remanding for resentencing by a different judge where, even in the absence of personal bias, “an objective observer might nonetheless question [the judge’s] impartiality” (alteration in original) (quoting *United States v. DeMott*, 513, F.3d 55, 59 (2d Cir. 2008) (per curiam))).

III. ENHANCING MR. KERIK'S SENTENCE DUE TO THE CRITICISM OF THE PROSECUTORS CANNOT BE JUSTIFIED BY A CLAIM THAT SUCH SPEECH WAS RELEVANT TO MR. KERIK'S SENTENCING.

The government's alternative argument is that punishing Mr. Kerik for the criticism of the prosecution was not improper, because Mr. Kerik's and Mr. Modafferi's "statements and views about the prosecution [] were directly and highly relevant to Kerik's sentencing." *See Resp.* at 40-42. The government suggests that the speech was relevant (a) to show Mr. Kerik's "motive" for violating the protective order during the course of the proceeding and (b) to "rebut mitigating evidence" of Mr. Kerik's extraordinary career in public service. *Id.* at 42-43. Those arguments should be rejected.

As an initial matter, both conclusory propositions rest upon a fallacy: that Mr. Kerik's guilty plea demonstrates that it was improper for Mr. Kerik (or his supporters) to suggest that the prosecution against him was undertaken in bad faith. *See Resp.* at 42-43. Wholly absent from the government's response is any acknowledgement that Mr. Kerik was *not* convicted of the most serious "honest services" corruption charges at the heart of the indictment. He has always maintained his innocence of those charges. And in fact, those charges were the subject

of a prior state prosecution which failed to turn up direct evidence that Mr. Kerik had accepted a kickback in the form of apartment renovations. *See Br.* at 7.⁵ The writings that offended the judge so deeply primarily challenged the propriety of these grave charges (which were dropped) and the prosecution’s discretionary decision to pursue the lesser charges (to which Mr. Kerik pleaded guilty), especially in light of the apparent contrasting treatment of Democratic political appointees. *See Br.* at 9-12.

More generally, the exception allowing consideration of speech at sentencing established by *Dawson v. Delaware*, 503 U.S. 159, 166-68 (1992) and its progeny is a narrow one – and for good reason. The freedom to express controversial or unpopular views – and certainly to criticize the government – without fear of punishment is at the core of the First Amendment, and must be vigilantly safeguarded. Indeed, in *Dawson* itself, where the defendant had introduced mitigating evidence of “good character,” and rehabilitation in prison, the Supreme Court nevertheless held that evidence of the defendant’s membership in a

⁵ The government’s lengthy statement of facts and procedural history never once mentions the prior state prosecution.

racist prison gang was “totally without relevance to the sentencing proceeding,” and therefore constitutional error. *Id.* at 159, 170.

Where evidence of speech or beliefs is admitted at sentencing, the nexus to specific facts at issue must be a close one. *Compare Kapadia v. Tally*, 229 F.3d 641, 644-48 (7th Cir. 2000) (district court properly considered defendant’s anti-Semitic post-conviction remarks in sentencing defendant for attack on a Jewish community center as relevant to likelihood of reform), *with O’Brien v. United States*, 376 F.2d 538, 542 (1st Cir. 1967) (vacating sentence because defendant may have received a higher sentence for expressing opposition to the war by burning his draft card and “[f]or the court to conclude ... that the impact of such conduct would impede the war effort, and measure the sentence by the nature of his communication would be to punish defendant, pro tanto, for exactly what the First Amendment protects”), *vacated on other grounds*, 391 U.S. 367 (1968). *See also Dawson*, 503 U.S. at 168 (Delaware’s argument that it could introduce Dawson’s racist views to rebut Dawson’s mitigation evidence “misse[d] the mark because ... the Aryan Brotherhood evidence presented in this case cannot be viewed as relevant ‘bad’ character evidence in its own right.”)

To our knowledge, no court has ever approved a sentencing enhancement based on a defendant's (or his or her supporters') criticism of the prosecutors.

Here the judge's position was, in essence, that it was improper for someone in law enforcement to challenge the good faith of someone else in law enforcement. That is not a sound principle, and it boils down to little more than a former United States Attorney's personal "revulsion arising out of" Mr. Kerik's views. *United States v. Brown*, 479 F.2d 1170, 1174 (2d Cir. 1973). *Cf. United States v. Bakker*, 925 F.2d 728, 740-41 (4th Cir. 1991) (remanding for resentencing by a different judge where original judge had violated due process when he expressed personal outrage in remarks reflecting that his sense of religious propriety had somehow been betrayed).⁶ But "[a] court may not punish

⁶ See also *Comm. v. Mills*, 436 Mass. 387, 401 (2002) (remanding for resentencing by a different judge where sentencing transcript "strongly suggests that the judge's personal feelings interfered with his sentencing decision," where "[p]articularly troubling [was] the judge's discussion of his own personal religious experiences, his statement about the impact that his sentencing may have on public perceptions of corruption by Commonwealth employees, and his commentary on the fact that the defendant had not admitted to culpability" (emphasis added)). Compare also A878-79 ("[I]f you look at someone like me, my law clerks, who are a year out of law school, will leave this job next year and make more money than I do. That's the way the system works, and

an individual by imposing a heavier sentence for the exercise of first amendment rights.” *United States v. Lemon*, 723 F.2d 922, 937 (D.C. Cir. 1983). There is no legitimate argument that Mr. Kerik’s mitigating evidence about his public service in law enforcement justified punishing him for acquiescing in his supporters’ suggestions that his prosecution was unfairly selective, successive, or politically motivated.

IV. THE JUDGE’S REMARKS ABOUT MR. KERIK’S FAILURE TO DISAVOW HIS SUPPORTERS’ SPEECH MAKE CLEAR THAT THE COURT PENALIZED MR. KERIK IN VIOLATION OF HIS FIFTH AMENDMENT RIGHTS.

In our opening brief, we demonstrated that the District Court’s reliance on the fact that Mr. Kerik “never disavowed” and “never stopped” the public statements of his supporters violated the Fifth Amendment. *See Br. at 32-35.* The government contends that the judge’s statements are read out of context, but were clarified later to be

we can grouse about it and be upset about it, but that’s the way it works and that’s what happens to public servants. And, so, what happens as a result is you look at your own life and you see the relatively meager circumstances. Your house is a lot smaller. You don’t drive as nice a car. You don’t get to go to Aspen in the winter and Cabo in the summer, and your friends do.... You look at your friends and say, when you want to go off to Mexico for vacation, you get to jet off, but I don’t. And you live in a big house, and I don’t. If you want to personalize it, I can’t afford to send my daughter to the college she goes to. I am not trying to make this about me.”).

merely code for Mr. Kerik's conduct.⁷ For the reasons discussed *supra*, that is not the case. The transcript is straightforward, and there is no

⁷ The government argues that Mr. Kerik waived his Fifth Amendment rights by submitting affidavits to the District Court, and particularly an affidavit in which Mr. Kerik acknowledged that he agreed with "some" of Mr. Modafferi's writings and opinions. *See* Resp. at 37 n.*. But that affidavit could not possibly support a waiver of Fifth Amendment rights, as it was an affidavit the District Court *compelled* Mr. Kerik to produce with a significant level of detail under threat of revoking Mr. Kerik's bail. *See* A138-48 (listing for ten transcript pages the minute level of detail District Court required in second affidavit regarding Mr. Kerik's relationship with Mr. Modafferi); *id.* at A157 (stating that unless the new affidavit provided "a very different understanding, I am likely to remand [Mr. Kerik]").

"The Supreme Court has held that the government 'may not impose substantial penalties because [an individual] elects to exercise his Fifth Amendment right not to give incriminating testimony against himself.'" *United States v. Cruz*, 156 F.3d 366, 372 (2d Cir. 1998) (quoting *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977)). These penalty cases "have all involved some kind of loss or reduction from the status quo" such as where "the 'sanction' threatened has been in the nature of revocation of probation." *Id.* "[C]learly a defendant does not have a 'free choice to admit, deny, or to refuse to answer' if he knows he will be incarcerated for a longer period of time if he does not make the incriminating statements." The touchstone of the Fifth Amendment is compulsion, and the Supreme Court has recognized that imprisonment is one of a wide variety of penalties which can serve to trigger a constitutional violation." *United States v. Oliveras*, 905 F.2d 623, 628 (2d Cir. 1990) (quoting *United States v. Perez-Franco*, 873 F.2d 455, 463 (1st Cir. 1989)). As these authorities make clear, Mr. Kerik's compliance with the Court's order to supply a minutely detailed affidavit under threat of the sanction of bail revocation could not have waived any Fifth Amendment privilege related to that compliance.

basis to presume that Judge Robinson did not mean exactly what he said: he was troubled that Mr. Kerik did not stop others from asserting his innocence prior to his plea to the lesser crimes of the indictment. Indeed, the judge's comments only underscore what the government tries to obscure: that Mr. Kerik was punished for the speech of others.

It is understandable that the prosecutors might take umbrage at having had their good faith questioned. And it is apparent from the government's brief that the prosecutors still have strong feelings about Modafferi's claims: they repeatedly describe Modafferi's allegations as "false, defamatory and inflammatory," *e.g.* Resp. at 15, 41, and they single out a letter posted on the Kerik Legal Defense Trust's website that alleged that the prosecutors had suppressed exculpatory evidence and were acting in an abusive and politically motivated manner. Resp. at 15; *see* A302, 304.⁸

⁸ There is no allegation in the record that the content of this letter derived from any violation of the court's protective order securing confidential information from public release. (Moreover it is, we respectfully submit, remarkably benign given the reaction that it sparked from the prosecutors and the judge. It can be found at A302 and A304.)

But in our society citizens are entitled to criticize and question the motives of government officials. Indeed, the claims Modafferi published, and that Mr. Kerik did not “disavow,” are arguments that – while perhaps upsetting to prosecutors and to the judge – could certainly be made in good faith: that there was something troubling about the way that Mr. Kerik’s tax offenses were treated in comparison to the treatment of transgressions by officials like Tom Daschle and Timothy Geithner; that the prosecution’s suggestion that Mr. Kerik would face more serious charges if he did not plead guilty to lesser ones constituted an “ultimatum”; that the sworn statement by former Inspector General Caruso that he was pressured to give false, inculpatory testimony about Mr. Kerik cast doubt on the entire prosecution; and that the federal prosecution was inappropriate and unfair in light of the already-resolved proceedings at the state level. *See* Br. at 8-12. “The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.” *In re Oliver*, 333 U.S. 257, 270-271 (1948)). Despite the government’s claims to the contrary, the transcript makes clear that Mr. Kerik’s failure to “disavow”

Modafferi's public pronouncements about the prosecution was one of the reasons that the judge increased his punishment. That was improper and unsustainable.

V. RESENTENCING SHOULD BE REQUIRED DUE TO THE ABSENCE OF NOTICE THAT THE JUDGE WOULD RELY ON THE CRITICISMS OF THE PROSECUTORS TO ENHANCE MR. KERIK'S SENTENCE.

With respect to the absence of notice in this case, the government's attacks a strawman. The error that we cite was not an absence of notice of the judge's intent to *vary* above the Guidelines range. Resp. at 44-45. Instead, as we explained in our opening brief, Mr. Kerik was not on notice that the lower court would consider Mr. Kerik's failure to keep others from criticizing the government prior to his plea, and certainly lacked notice that Modafferi's prior articles that were not based on information disclosed in violation of a protective order – the violation which was the premise for the obstructive conduct at issue in this case – could form the basis of a sentence enhancement. See Br. at 35-37.

In suggesting that the resentencing materials' inclusion of "facts surrounding [Mr. Kerik's] relationship with Modafferi" sufficed as adequate notice, the government simply echoes the court's error below.

See Resp. at 45. The violation of a court order (the subject of the presentencing materials enumerated by the government) is not the same thing as Modafferi's legitimate and protected speech (the articles published on obscure websites that had nothing to do with the allegations of obstructive conduct). There is no allegation in this case that Modafferi's articles – albeit highly critical of the prosecution – derived from the violation of any court order. Accordingly, Mr. Kerik lacked notice that those articles would form the basis of a sentencing enhancement.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in our opening brief, this Court should vacate Mr. Kerik's sentence and remand his case for resentencing.

Dated: New York, New York
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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4304 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in fourteen point font Century Schoolbook.

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