



United States District Courthouse
300 Quarropas Street
White Plains, New York 10601

November 4, 2009

Michael F. Bachner, Esq.
26 Broadway
Suite 2310
New York, New York 10004-1807

Re: *United States v. Bernard B. Kerik*, S1 07 Cr. 1027 (SJR)

Dear Mr. Bachner:

This prosecution and the protection against prosecution, with respect to tax offenses, set forth below have been approved by the Tax Division, Department of Justice.

On the understandings specified below, and upon a plea allocution satisfactory to the Government, the Office of the United States Attorney for the Southern District of New York ("this Office") will accept a guilty plea from Bernard B. Kerik, ("the defendant") to Counts Four, Five, and Ten through Thirteen of the above-captioned Indictment. In addition, the defendant agrees to: a) transfer, pursuant to Federal Rule of Criminal Procedure 20, the case of *United States v. Kerik*, 09 Cr. 142 (RMC) ("the DC Indictment") from the District of Columbia, where it is currently pending, to the Southern District of New York and b) waive venue as to Counts One and Two of the DC Indictment. On the understandings specified below, and upon a plea allocution satisfactory to the Government, this Office will then accept a guilty plea from the defendant to Counts One and Two of the DC Indictment.

Count Four of the above-captioned Indictment charges the defendant with obstructing and impeding the due administration of the internal revenue laws, in violation of Title 26, United States Code, § 7212(a), and carries a maximum sentence of 3 years' imprisonment, a maximum fine, pursuant to Title 18, United States Code, Section 3571 of the greatest of \$250,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to the United States, a \$100 special assessment, and supervised release of one year. In addition to the

foregoing, the defendant agrees that the Court shall also impose an order of restitution on Count Four, pursuant to Title 18, United States Code, Sections 3663, 3663A, and 3664 in an amount of \$187,931.

Count Five of the above-captioned Indictment charges the defendant with aiding in the preparation of a false tax return, in violation of Title 26, United States Code, § 7206(2), and carries a maximum sentence of three years' imprisonment, a maximum fine, pursuant to Title 18, United States Code, Section 3571 of the greatest of \$250,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to the United States, a \$100 special assessment, supervised release of one year, and the costs of prosecution.

Count Ten of the above-captioned Indictment charges the defendant with making false statements on a loan application in violation of Title 18, United States Code, Section 1014. This charge carries a maximum sentence of thirty years' imprisonment, a maximum term of five years' supervised release, a maximum fine, pursuant to Title 18, United States Code § 3571 of the greatest of \$250,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to a person other than the defendant as a result of the offense, and a mandatory \$100 special assessment. The Government is currently unaware of any basis for restitution on Count Ten.

Counts Eleven through Thirteen of the above-captioned Indictment and Counts One and Two of the DC Indictment each charge the defendant with a violation of Title 18, United States Code, Section 1001, in connection with making false statements to the Federal Government during the application and background review process relating to the defendant's application for positions with the Federal Government involving national security. These counts carry a maximum sentence of five years' imprisonment, a maximum term of three years' supervised release, a maximum fine, pursuant to Title 18, United States Code § 3571 of the greatest of \$250,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to a person other than the defendant as a result of the offense, and a mandatory \$100 special assessment. The Government is currently unaware of any basis for restitution on these counts.

It is understood that the total maximum sentence of incarceration on the above eight counts is sixty-one (61) years' imprisonment.

It is understood that, prior to the date of sentencing, the defendant shall file accurate amended personal tax returns for the calendar years 1999 through 2003 and 2005. The defendant will pay any past taxes due and owing to the Internal Revenue Service ("IRS") by him for calendar years 1999 through 2003 and 2005 including any applicable penalties on such terms and conditions as will be agreed upon between the defendant and the IRS.

In consideration of his plea to the above offenses, the defendant will not be further prosecuted criminally by this Office and, with respect to tax offenses, the Tax Division, Department of Justice, for any crimes relating to: a) the conduct charged in the above-captioned Indictment; b) the conduct charged in the DC Indictment; and c) any violation of the protective order on consent entered by the District Court in this case on March 19, 2008. Further, in consideration of his plea to the above offenses, the defendant will not be prosecuted criminally by this Office and, with respect to tax offenses, the Tax Division, for: a) any conduct in connection with his business activities abroad in 2005 through 2007 that was the subject of a prior investigation by this Office and b) any electronic surveillance in 2005 that was the subject of a prior investigation by this Office. In addition, at the time of sentencing, the Government will move to dismiss any open Counts against the defendant in the above-captioned Indictment. This Agreement does not provide any protection against prosecution except as set forth above. The defendant agrees that with respect to any and all dismissed charges he is not a "prevailing party" within the meaning of the "Hyde Amendment," Section 617, P.L. 105-119 (Nov. 26, 1997), and will not file any claim under that law.

In consideration of the foregoing and pursuant to United States Sentencing Guidelines ("U.S.S.G.") §6B1.4, the parties hereby stipulate to the following:

The parties agree that the November 1, 2008 Guidelines Manual applies to this case.

A. Offense Level

1. Counts Four and Five ("The Tax Offenses")

- a. Because the total tax loss is greater than \$80,000 but less than \$200,000, the base offense level under U.S.S.G. §§ 2T1.1, 2T4.1(F) is 16.

- b. Because the defendant failed to report income exceeding \$10,000 in a single year from criminal activity, 2 levels are added.
- c. The Total offense level for the Tax Counts is 18.
2. Count Ten (False Statements on a Loan Application)
- Pursuant to U.S.S.G. § 2B1.1((a)(1), the total offense level is 7.
3. Counts Eleven through Thirteen of the above-captioned Indictment and Counts One and Two of the DC Indictment ("The False Statement Counts")
- Because the False Statement Counts resulted in no monetary loss, the total offense level is 6 pursuant to U.S.S.G. § 2B1.1(a)(2).
4. Multiple Counts
- Pursuant to U.S.S.G. § 3D1.2, The Tax Offenses, The False Statement and The False Statements on a Loan Application Counts are grouped together. Because the Tax Offenses carry the highest offense level, and because no monetary loss resulted from the False Statements and False Statements on a Loan Application Count, the total offense level for the grouped counts is 18. Even if the counts were to be grouped separately, the offense level would still be 18.
5. Because the defendant willfully obstructed or impeded the administration of justice in this case, 2 levels are added resulting in a total offense level of 20. The parties agree that this enhancement covers any and all allegations of obstruction, including the disclosure of confidential information to Anthony Modafferi.
6. Assuming the defendant clearly demonstrates acceptance of responsibility, to the satisfaction of the Government, through his allocution and subsequent conduct prior to the imposition of sentence, a 2-level reduction will be warranted, pursuant to U.S.S.G. § 3E1.1(a).

In accordance with the above, the applicable Guidelines offense level is 18.

B. Criminal History Category

Based upon the information now available to this Office (including representations by the defense), the defendant has no criminal history points.

In accordance with the above, the defendant's Criminal History Category is I.

C. Sentencing Range

Based upon the calculations set forth above, the defendant's stipulated sentencing Guidelines range is 27 to 33 months (the "Stipulated Guidelines Range"). In addition, after determining the defendant's ability to pay, the Court may impose a fine pursuant to U.S.S.G. §5E1.2. At Guidelines level 18, the applicable fine range is \$6,000 to \$60,000.

The parties agree that neither a downward nor an upward departure from the Sentencing range set forth above is warranted. Accordingly, neither party will seek such a departure or seek any adjustment not set forth herein. Nor will either party suggest that the Probation Department consider such a departure or adjustment, or suggest that the Court *sua sponte* consider such a departure or adjustment.

The parties further agree that a sentence within the Stipulated Guidelines Range would constitute a reasonable sentence in light of all of the factors set forth in Title 18, United States Code, Section 3553(a). In addition, neither party will seek a sentence outside of the Stipulated Guidelines Range, suggest that the Probation Department consider a sentence outside of the Stipulated Guidelines Range, or suggest that the Court *sua sponte* consider a sentence outside of the Stipulated Guidelines Range.

Except as provided in any written Proffer Agreement(s) that may have been entered into between this Office and the defendant, nothing in this agreement limits the right of the parties (i) to present to the Probation Department or the Court any facts relevant to sentencing; (ii) to make any arguments regarding where within the Stipulated Guidelines Range (or such other range as the Court may determine) the defendant should be sentenced; (iii) to seek an appropriately adjusted Sentencing range if it is

determined based upon new information that the defendant's criminal history category is different from that set forth above. Nothing in this agreement limits the right of the Government to seek denial of the adjustment for acceptance of responsibility, see U.S.S.G. §3 E1.1, and/or imposition of an adjustment for obstruction of justice, see U.S.S.G. § 3C1.1, regardless of any stipulation set forth above, should the defendant move to withdraw his guilty plea once it is entered, or should it be determined that the defendant has either (i) engaged in conduct, unknown to the Government at the time of the signing of this Agreement, that constitutes obstruction of justice or (ii) committed another crime after signing this agreement.

It is understood that pursuant to Sentencing Guidelines § 6B1.4(d), neither the Probation Department nor the Court is bound by the above Guidelines stipulation, either as to questions of fact or as to the determination of the proper Guidelines to apply to the facts. In the event that the Probation Department or the Court contemplates any Guidelines adjustments, departures, or calculations different from those stipulated to above, or contemplates any sentence outside of the Stipulated Guidelines Range, the parties reserve the right to answer any inquiries and to make all appropriate arguments concerning the same.

It is understood that the sentence to be imposed upon the defendant is determined solely by the Court. It is understood that the Sentencing Guidelines are not binding on the Court. The defendant acknowledges that his entry of a guilty plea to the charged offenses authorizes the sentencing court to impose any sentence, up to and including the statutory maximum sentence. This Office cannot, and does not, make any promise or representation as to what sentence the defendant will receive. Moreover, it is understood that the defendant will have no right to withdraw his plea of guilty should the sentence imposed by the Court be outside the Stipulated Guidelines Range set forth above.

It is further agreed (i) that the defendant will neither appeal, nor otherwise litigate under Title 28, United States Code, Section 2255 and/or Section 2241, any sentence within or below the Stipulated Guidelines Range and (ii) that the Government will not appeal any sentence within or above the Stipulated Guidelines Range. It is further agreed that any sentence within the Stipulated Guidelines Range is reasonable. This provision is binding on the parties even if the Court employs a Guidelines analysis different from that stipulated to herein. Furthermore, it is agreed that any appeal as to the defendant's sentence that is not foreclosed by this provision will be limited to that portion of the sentencing calculation

that is inconsistent with (or not addressed by) the above stipulation.

The defendant hereby acknowledges that he has accepted this plea Agreement and decided to plead guilty because he is in fact guilty. By entering this plea of guilty, the defendant waives any and all right to withdraw his plea or to attack his conviction, either on appeal or collaterally, on the ground that the Government has failed to produce any discovery material, Jencks Act material, exculpatory material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and impeachment material pursuant to *Giglio v. United States*, 405 U.S. 150 (1972) that has not already been produced as of the date of the signing of this agreement.

By entering this plea of guilty, the defendant also waives any and all right the defendant may have, pursuant to 18 U.S.C. §3600, to require DNA testing of any physical evidence in the possession of the Government. The defendant fully understands that, as a result of this waiver, any physical evidence in this case will not be preserved by the Government and will therefore not be available for DNA testing in the future.

The defendant understands that he is bound by his guilty plea regardless of the immigration consequences of the plea and regardless of any advice the defendant has received from his counsel or others regarding those consequences. Accordingly, the defendant waives any and all challenges to his guilty plea and to his sentence based on those consequences, and agrees not to seek to withdraw his guilty plea, or to file a direct appeal or any kind of collateral attack challenging his guilty plea, conviction or sentence, based on the immigration consequences of his guilty plea, conviction and sentence.

It is further agreed that should the convictions following the defendant's pleas of guilty pursuant to this Agreement be vacated for any reason, then any prosecution that is not time-barred by the applicable statute of limitations on the date of the signing of this agreement (including any counts that the Government has agreed to dismiss at sentencing pursuant to this Agreement) may be commenced or reinstated against the defendant, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement or reinstatement of such prosecution. It is the intent of this Agreement to waive all defenses based on the statute of limitations with respect to any prosecution that is not time-barred on the date that this Agreement is signed.

It is further understood that this Agreement does not bind any federal, state, or local prosecuting authority other than this Office and, to the extent set forth above, the Tax Division, Department of Justice. Apart from any written Proffer Agreements that may have been entered into between this Office, the Tax Division, Department of Justice and the defendant, this Agreement supersedes any prior understandings, promises, or conditions between this Office, the Tax Division, Department of Justice and the defendant. No additional understandings, promises, or conditions have been entered into other than those set forth in this Agreement, and none will be entered into unless in writing and signed by all parties.

Very truly yours,

PREET BHARARA
United States Attorney

By: Michael S. Bosworth, Perry A. Carbone, Elliott B. Jacobson
Asst. U.S. Attorney Michael S. Bosworth
Asst. U.S. Attorney Perry A. Carbone
Asst. U.S. Attorney Elliott B. Jacobson

APPROVED:

Margery B. Feinzig
Margery B. Feinzig
Chief, White Plains Division

AGREED AND CONSENTED TO:

[Signature]
Bernard B. Kerik

11/4/09
DATE

APPROVED:

[Signature]
Michael F. Bachner, Esq.
Attorney for Bernard B. Kerik

Nov. 4, 2009
DATE