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## **APPENDIX A**

### **UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

#### **SUMMARY ORDER**

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of November, two thousand twenty-three.

**PRESENT:**

**REENA RAGGI,  
RICHARD J. SULLIVAN,**

EUNICE C. LEE,  
*Circuit Judges.*

BORIS KOTLYARSKY,  
*Plaintiff-Appellant,*

v.

No. 22-2750

UNITED STATES DEPARTMENT OF JUSTICE,  
PREET BHARARA, in his official capacity, JAMES  
COMEY, in his official capacity,  
*Defendants-Appellees.\**

**For Plaintiff-Appellant:** BORIS KOTLYARSKY, *pro  
se*, Brooklyn, NY.

**For Defendants-Appellees:** Elizabeth J. Kim,  
Benjamin H. Torrance, Assistant United States  
Attorneys, *for* Damian Williams, United States  
Attorney for the Southern District of New York, New  
York, NY.

Appeal from a judgment of the United States  
District Court for the Southern District of New York  
(Paul G. Gardephe, *Judge*).

**UPON DUE CONSIDERATION, IT IS  
HEREBY ORDERED, ADJUDGED, AND  
DECREED that the September 30, 2022 judgment of  
the district court is AFFIRMED.**

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\* The Clerk of Court is respectfully directed to amend the official  
case caption as set forth above.

Boris Kotlyarsky, proceeding *pro se*, appeals from the district court’s judgment dismissing with prejudice his complaint against the United States Department of Justice, former United States Attorney Preet Bharara, and former FBI Director James Comey (collectively, “Defendants”) for maliciously prosecuting him and violating his constitutional rights. We assume the parties’ familiarity with the facts, procedural history, and issues on appeal, which we refer to only as necessary to resolve this appeal.

In 2017, Kotlyarsky was sentenced to 41 months’ imprisonment after pleading guilty to extortion and conspiracy to commit extortion in violation of 18 U.S.C. § 1951. Although Kotlyarsky did not directly appeal his conviction or sentence, he subsequently filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255, which was denied. Kotlyarsky again declined to appeal.

In 2020, Kotlyarsky – with the assistance of counsel – filed this action seeking damages for “violations of his constitutional rights, malicious prosecution, and negligent infliction of severe emotional and mental distress.” App’x at 9. By Report and Recommendation (“R&R”) dated August 18, 2021, Magistrate Judge Stewart Aaron recommended that Kotlyarsky’s complaint be dismissed without leave to amend. The district court thereafter adopted the R&R in its entirety and dismissed Kotlyarsky’s complaint with prejudice.

Defendants argue that we should affirm the district court’s judgment because Kotlyarsky forfeited

his claims on appeal – both by failing to object to the R&R and by failing to raise any arguments as to how the district court erred in dismissing his complaint in his appellate brief. We agree.

*First*, the record is clear that Kotlyarsky forfeited his claims on appeal by failing to object to the R&R. We have advised that “a party’s failure to object to any purported error or omission in a magistrate judge’s report [forfeits] further judicial review of the point,” *Cephas v. Nash*, 328 F.3d 98, 107 (2d Cir. 2003), so long as the parties “receive clear notice of the consequences” of a failure to object, *Smith v. Campbell*, 782 F.3d 93, 102 (2d Cir. 2015); *see also Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C.*, 596 F.3d 84, 92 (2d Cir. 2010) (“[A] party [forfeits] appellate review of a decision in a magistrate judge’s Report and Recommendation if the party fails to file timely objections designating the particular issue.”). Here, the R&R explicitly warned Kotlyarsky that failure to object to the R&R would result in the forfeiture of those objections for the purposes of appeal. On the day that objections were due, Kotlyarsky – who was then represented by counsel – filed an “affidavit in support of objection” in which he requested leave to amend his complaint on the basis that he could “demonstrate through documentary evidence that . . . [his criminal] case should have been dismissed” and that “the [g]overnment did not have a basis for [his] conviction.” App’x at 120. Though framed as a purported objection to the R&R, Kotlyarsky’s affidavit failed to address any of the R&R’s conclusions regarding the viability of his claims or to otherwise respond to the R&R’s

analysis in any way. Because the affidavit did not constitute a “specific . . . objection[]” to any of the R&R’s “proposed findings and recommendations,” Fed. R. Civ. P. 72(b)(2), and because Kotlyarsky offered no excuse or justification for his failure to object, we conclude that Kotlyarsky forfeited appellate review of the district court’s dismissal of his complaint.

*Second*, even if we were to construe Kotlyarsky’s affidavit as a valid objection to the R&R, we still would conclude that he forfeited any challenge to the district court’s judgment because he failed to address the substance of the district court’s dismissal in his brief on appeal. As Defendants note, Kotlyarsky’s brief – even liberally construed, *see McLeod v. Jewish Guild for the Blind*, 864 F.3d 154, 156 (2d Cir. 2017) – does not raise any arguments as to how the district court erred in dismissing his complaint. Instead, his brief focuses entirely on various challenges to the propriety of his underlying criminal conviction and the denial of his section 2255 motion. Consequently, Kotlyarsky has forfeited his challenge to the district court’s judgment by failing to include any arguments regarding the district court’s grounds for dismissal in his brief. *See Terry v. Inc. Vill. of Patchogue*, 826 F.3d 631, 632–33 (2d Cir. 2016) (“Although we accord filings from *pro se* litigants a high degree of solicitude, even a litigant representing himself is obliged to set out identifiable arguments in his principal brief.” (internal quotation marks omitted)); *LoSacco v. City of Middletown*, 71 F.3d 88, 93 (2d Cir. 1995) (“[W]e need not manufacture

claims of error for an appellant proceeding *pro se*.”).<sup>1</sup>

*Finally*, even if we were to review the challenged judgment *de novo*, we would still affirm the dismissal of Kotlyarsky’s complaint because his attempt to use a civil damages action to challenge his criminal conviction is jurisdictionally and procedurally barred for the reasons set forth in the R&R.

We have considered Kotlyarsky’s remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:

Catherine O’Hagan Wolfe, Clerk of Court  
/s/

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<sup>1</sup> In his appellate brief, Kotlyarsky asserts in passing that the district court “erroneously dismissed his claims without leave to amend.” Kotlyarsky Br. at 4. This cursory reference to the denial of leave to amend is insufficient to preserve the issue for appellate review. *See Gerstenbluth v. Credit Suisse Sec. (USA) LLC*, 728 F.3d 139, 142 n.4 (2d Cir. 2013) (concluding that a *pro se* litigant forfeited his challenge to an aspect of the district court’s judgment that he only referenced “obliquely and in passing”). But even if we were to excuse this forfeiture and review the district court’s denial of leave to amend *de novo*, *see L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 435 (2d Cir. 2011), we would find no error in the district court’s conclusion that any attempt to amend the complaint would be futile.

**United States Court of Appeals  
for the Second Circuit**

**Thurgood Marshall U.S. Courthouse  
40 Foley Square  
New York, NY 10007**

**DEBRA ANN LIVINGSTON  
CHIEF JUDGE**

Date: November 15, 2023

Docket #: 22-2750pr

Short Title: Kotlyarsky v. United States  
Department of Justice

**CATHERINE O'HAGAN WOLFE  
CLERK OF COURT**

DC Docket #: 20-cv-9230

DC Court: SDNY (NEW YORK CITY)

DC Judge: Aaron

DC Judge: Gardephe

**BILL OF COSTS INSTRUCTIONS**

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- \* be filed within 14 days after the entry of judgment;
- \* be verified;

- \* be served on all adversaries;
- \* not include charges for postage, delivery, service, overtime and the filers edits;
- \* identify the number of copies which comprise the printer's unit;
- \* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- \* state only the number of necessary copies inserted in enclosed form;
- \* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- \* be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals  
for the Second Circuit**

**Thurgood Marshall U.S. Courthouse  
40 Foley Square  
New York, NY 10007**

**DEBRA ANN LIVINGSTON  
CHIEF JUDGE**

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DC Docket #: 20-cv-9230

DC Court: SDNY (NEW YORK CITY)

DC Judge: Aaron

DC Judge: Gardephe

**VERIFIED ITEMIZED BILL OF COSTS**

Counsel for \_\_\_\_\_ respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the \_\_\_\_\_ and in favor of \_\_\_\_\_ for insertion in the mandate.

Docketing Fee \_\_\_\_\_

Costs of printing appendix (necessary copies \_\_\_\_\_) \_\_\_\_\_

Costs of printing brief (necessary copies \_\_\_\_\_) \_\_\_\_\_

Costs of printing reply brief (necessary copies   )   

**(VERIFICATION HERE)**

\_\_\_\_\_  
Signature

## **APPENDIX B**

### **UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK**

**BORIS KOTLYARSKY,  
Plaintiff,**

**- against -**

**UNITED STATES DEPARTMENT OF  
JUSTICE; PREET BHARARA, in his  
official capacity; and JAMES COMEY, in  
his official capacity,  
Defendants.**

### **ORDER**

**20 Civ. 9230 (PGG) (SDA)**

**PAUL G. GARDEPHE, U.S.D.J.:**

Plaintiff Boris Kotlyarksy brings this action against the United States Department of Justice; Preet Bharara, the former United States Attorney for the Southern District of New York, in his official capacity; and James Corney, the former Director of the Federal Bureau of Investigation, in his official capacity ("Defendants"). Kotlyarksy alleges that Defendants violated his constitutional rights in connection with his 2017 conviction for conspiracy to commit Hobbs Act extortion and aiding and abetting Hobbs Act extortion. (Cmplt. (Dkt. No. 1))

Pending before this Court is Defendants' motion to dismiss. (Dkt. No. 19) This Court referred Defendants' motion to Magistrate Judge Stewart D. Aaron for a report and recommendation ("R&R"). (Dkt. No. 23) Judge Aaron has issued an R&R, in which he recommends that the Complaint be dismissed with prejudice. (R&R (Dkt. No. 24)) Plaintiff has filed objections to the R&R. (Pltf. Obj. (Dkt. No. 25))

For the reasons stated below, Judge Aaron's R&R will be adopted in its entirety, and the Complaint will be dismissed with prejudice.

## **BACKGROUND**

### **I. PRIOR CRIMINAL PROCEEDINGS**

This action arises out of criminal proceedings against Kotlyarsky in this District. (See *United States v. Boris Kotlyarsky*, No. 16 Cr. 215 (LAK)) On October 27, 2016, Kotlyarsky pled guilty to conspiracy to commit Hobbs Act extortion, in violation of 18 U.S.C. § 1951, and to aiding and abetting Hobbs Act extortion, in violation of 18 U.S.C. §§ 1951 and 2. On May 31, 2017, Judge Kaplan sentenced Kotlyarsky to 41 months' imprisonment. *Kotlyarsky v. United States*, No. 18 Civ. 1746 (LAK), 2019 WL 1957537, at \*1-2 (S.D.N.Y. May 2, 2019). Kotlyarsky did not appeal his conviction or sentence. (*Id.* at \*3)

On February 23, 2018, pursuant to 28 U.S.C. § 2255, Kotlyarsky moved to vacate or reduce his sentence on a variety of grounds, including that his conduct had not affected interstate commerce; he had

received ineffective assistance of counsel; the Government had violated its Brady obligations; and his plea agreement should be invalidated. *Kotlyarsky v. United States*, No. 18 Civ. 1746, Dkt. No. 1; *Kotlyarsky v. United States*, 2019 WL 1957537, at \* 3. In a May 2, 2019 memorandum opinion denying Kotlyarsky's motion, Judge Kaplan described his offense conduct as follows:

In January, 2016, the government filed a criminal complaint alleging that Kotlyarsky brokered a deal between Boris Nayfeld and Oleg Mitnik, wherein Mitnik agreed to pay Nayfeld approximately \$125,000 in exchange for Nayfeld's promise to halt a pending contract for Mitnik's murder. The murder contract was ordered by a Russian businessman named Anatoly Potik, who was Mitnik's father-in-law. Kotlyarsky knew Nayfeld through Potik. Kotlyarsky learned that Patik planned to hire Nayfeld to kill someone and discerned that the intended victim was Mitnik. Kotlyarsky informed Mitnik of the pending murder contract and arranged meetings between Nayfeld and Mitnik. Kotlyarsky believed that Nayfeld would demand money from Mitnik to halt the murder contract, and that due to Nayfeld's criminal reputation, Mitnik would likely pay the money that Nayfeld demanded.

Unbeknownst to Kotlyarsky or to Nayfeld, Mitnik contacted law enforcement after Kotlyarsky informed him of the existence of the murder contract. Subsequent meetings and communications that Mitnik had with Kotlyarsky and Nayfeld relating to the murder contract were recorded. Mitnik agreed to pay Nayfeld the first \$50,000 payment toward the agreed-upon sum of \$125,000 at an in-person meeting. At that meeting, Mitnik wrote a check for \$50,000 and gave it to Nayfeld. Upon leaving the restaurant where the meeting took place, the FBI arrested Nayfeld. Shortly thereafter, Kotlyarsky was arrested also.

(*Id.* at \* 1 ( citations omitted))

## II. THE INSTANT CASE

The Complaint was filed on November 3, 2020, and asserts claims pursuant to 42 U.S.C. § 1983 for Defendants' alleged violations of Kotlyarsky's constitutional rights, including suppression of exculpatory evidence and unlawful detention, in connection with Kotlyarsky's 2017 extolition convictions. (Cmplt. (Dkt. No. 1)) ¶¶ 81-95) The Complaint also asserts state law claims for malicious prosecution and intentional or negligent infliction of

emotional distress.<sup>1</sup> (*Id.* ¶¶ 96-104) Kotlyarsky seeks \$250 million in damages. (*Id.* at 23)

On August 6, 2021, Defendants moved to dismiss, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), arguing, *inter alia*, that Kotlyarsky's claims are barred by (1) collateral estoppel; (2) *Heck v. Humphrey*, 512 U.S. 477 (1994); and (3) sovereign immunity. (*See* Dkt. Nos. 19-20) On August 9, 2021, Kotlyarsky filed an affidavit in opposition. (Pltf. Opp. (Dkt. No. 21)) The Government filed a reply memorandum later that day. (Def. Reply Br. (Dkt. No. 22))

On August 10, 2021, this Court referred Defendants' motion to Judge Aaron for an R&R. (Order of Reference (Dkt. No. 23)) On August 18, 2021, Judge Aaron issued an R&R in which he recommends that the Complaint be dismissed with prejudice. (R&R (Dkt. No. 24)) On September 1, 2021, Kotlyarsky filed objections in the form of an affidavit. (Pltf. Obj. (Dkt. No. 25)) Defendants filed a response on September 7, 2021. (Def. Resp. (Dkt. No. 26))

## DISCUSSION

### I. LEGAL STANDARDS

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<sup>1</sup> The heading for Kotlyarsky's emotional distress claim states "Intentional Infliction of Emotional Distress" (Cmplt. (Dkt. No. 1) at 22), but elsewhere the Complaint alleges "negligent" infliction of emotional distress (see *id.* ¶¶ 5, 103).

## A. Review of a Report and Recommendation

A district court reviewing a magistrate judge's report and recommendation "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). "The district judge evaluating a magistrate judge's recommendation may adopt those portions of the recommendation, without further review, where no specific objection is made, as long as they are not clearly erroneous." *Gilmore v. Comm'r of Soc. Sec.*, No. 09 Civ. 6241 (RMB) (FM), 2011 WL 611826, at \*1 (S.D.N.Y. Feb. 18, 2011) (quoting *Chimarev v. TD Waterhouse Investor Servs., Inc.*, 280 F. Supp. 2d 208, 212 (S.D.N.Y. 2003)). A decision is "clearly erroneous" when, "upon review of the entire record, [the court is] left with the definite and firm conviction that a mistake has been committed." *United States v. Snow*, 462 F.3d 55, 72 (2d Cir. 2006) (quotation marks and citation omitted).

Where, as here, a timely objection has been made to a magistrate judge's recommendation, the district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). However, "[o]bjections that are 'merely perfunctory responses argued in an attempt to engage the district court in a rehashing of the same arguments set forth in the original [papers] will not suffice to invoke *de novo* review.'" *Phillips v. Reed Grp., Ltd.*, 955 F. Supp. 2d 201, 211 (S.D.N.Y. 2013) (second alteration in *Phillips*) (quoting *Vega v.*

*Altuz*, No. 97 Civ. 3775 (LTS)(JCF), 2002 WL 31174466, at \*1 (S.D.N.Y. Sept. 30, 2002)). "To the extent ... that the party ... simply reiterates the original arguments, [courts] will review the Report strictly for clear error." *IndyMac Bank, F.S.B. v. Nat'l Settlement Agency, Inc.*, No. 07 Civ. 6865 (LTS)(GWG), 2008 WL 4810043, at \*1 (S.D.N.Y. Nov. 3, 2008) (citing *Pearson-Fraser v. Bell Atl.*, No. 01 Civ. 2343 (WK), 2003 WL 43367, at \*1 (S.D.N.Y. Jan. 6, 2003) and *Camarda v. Gen. Motors Hourly-Rate Emp. Pension Plan*, 806 F. Supp. 380, 382 (W.D.N.Y. 1992)); *see also Ortiz v. Barkley*, 558 F. Supp. 2d 444, 451 (S.D.N.Y. 2008) ("Reviewing courts should review a report and recommendation for clear error where objections are merely perfunctory responses, ... rehashing ... the same arguments set forth in the original petition." (quotation marks and citations omitted)).

"Courts generally do not consider new evidence raised in objections to a magistrate judge's report and recommendation." *Tavares v. City of New York*, No. 08 Civ. 3782 (PAE), 2011 WL 5877548, at \*2 (S.D.N.Y. Nov. 23, 2011) (citation omitted). "The submission of new evidence following [a magistrate judge's R&R] is merited only in rare cases, where the party objecting ... has offered a most compelling reason for the late production of such evidence, or a compelling justification for [the] failure to present such evidence to the magistrate judge." *Fischer v. Forrest*, 286 F. Supp. 3d 590, 603 (S.D.N.Y. 2018), *affd*, 968 F.3d 216 (2d Cir. 2020) (quotation marks and citations omitted).

## **B. Rule 12(b)(1) Motion to Dismiss**

"[A] federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit ([i.e.,] subject-matter jurisdiction)." *Sinochem Int'l Co., Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-31 (2007) (citation omitted). "A case is properly dismissed for lack of subject matter jurisdiction under [Federal] Rule [of Civil Procedure] 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). When subject matter jurisdiction is challenged, a plaintiff "bear[s] the burden of showing by a preponderance of the evidence that subject matter jurisdiction exists." *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003) (quoting *Lunney v. United States*, 319 F.3d 550, 554 (2d Cir. 2003)).

In addressing a motion to dismiss under Rule 12(b)(1), the court "must accept as true all material factual allegations in the complaint, but [is] not to draw inferences from the complaint favorable to plaintiff[]." *J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 110 (2d Cir. 2004). The court "may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue, but ... may not rely on conclusory or hearsay statements contained in the affidavits." *Id.* (citations omitted). In resolving a Rule 12(b)(1) motion, a court may also "consider matters of which judicial notice may be taken." *Greenblatt v. Gluck*, No. 3 Civ. 597 (RWS), 2003 WL 1344953, at \*1 n.1 (S.D.N.Y. Mar. 19, 2003) (quotation marks and citations omitted).

### **C. Rule 12(b)(6) Motion to Dismiss**

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Under this standard, a plaintiff is required only to set forth a "short and plain statement of the claim," Fed. R. Civ. P. 8(a), with sufficient factual "heft to 'sho[w] that the pleader is entitled to relief.'" *Twombly*, 550 U.S. at 557 (quoting Fed. R. Civ. P. 8(a)). Where "the allegations in a complaint, however true, could not raise a claim of entitlement to relief," *id.* at 558, or where a plaintiff has "not nudged [his] claims across the line from conceivable to plausible, the[] complaint must be dismissed." *Id.* at 570. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice [to establish entitlement to relief]." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

In resolving a motion to dismiss, a court may "consider ... the complaint and any documents attached thereto or incorporated by reference and documents upon which the complaint relies heavily." *Bldg. Indus. Elec. Contractors Ass'n v. City of New York*, 678 F.3d 184, 187 (2d Cir. 2012) (quotation marks and citation omitted).

### **II. REVIEW OF JUDGE AARON'S REPORT AND RECOMMENDATION**

In his R&R, Judge Aaron concludes that

Kotlyarsky's claims should be dismissed for multiple reasons, including that (1) his Section 1983 claims are not viable against a federal agency and federal officials in their official capacity; (2) the Court lacks subject matter jurisdiction over Kotlyarsky's state law claims, which are governed by the Federal Tort Claims Act; (3) Kotlyarsky is collaterally estopped from pursuing his claims as a result of his convictions and the adverse decision concerning his Section 2255 motion; and (4) Kotlyarsky's claims are barred by *Heck v. Humphrey*, 512 U.S. 477, 487 (1994), in which the Supreme Court held that Section 1983 claims are barred unless "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus." (See R&R (Dkt. No. 24) at 6-12)

With respect to Kotlyarsky's Section 1983 claims, Judge Aaron notes that "[a]ctions of the federal government or its officers are exempt from the proscriptions of § 1983," since Section 1983 "only provides redress for federal statutory and constitutional violations perpetrated under color of state law." (*Id.* at 6 (quoting *Nghiem v. U.S. Dep't of Veterans Affs.*, 451 F. Supp. 2d 599, 605 (S.D.N.Y. 2006) (emphasis in original))) Judge Aaron also notes that federal agencies and federal officers sued in their official capacities under Section 1983 are protected from suit by sovereign immunity. (*Id.* at 7 n.2 (citing *Harrison v. New York*, 95 F. Supp. 3d 293, 316 (E.D.N.Y. 2015); *Adeleke v. United States*, 355 F.3d 144, 150 (2d Cir. 2004); and *Davis v. United States*, No.

03-CV-01800 (NRB), 2004 WL 324880, at \*10 (S.D.N.Y. Feb. 19, 2004))) Accordingly, Judge Aaron concludes that Kotlyarsky's Section 1983 claims against Defendants – an agency of the federal government and two federal officers in their official capacities – must be dismissed. (*Id.* at 7)

As to Kotlyarsky's state law claims for malicious prosecution and intentional or negligent infliction of emotional distress, Judge Aaron concludes that the Court lacks subject matter jurisdiction over these claims, "because they fall within the purview of the [Federal Tort Claims Act ("FTCA")], [and Kotlyarsky] fails to allege that he has exhausted his administrative remedies . , as the FTCA requires." (*Id.* at 8 (citing 28 U.S.C. § 2675(a))) Judge Aaron also notes that the Court would lack jurisdiction over the Defendants in this case, in connection with otherwise procedurally proper FTCA claims, because such claims can only be brought against the United States itself. (*Id.* at 8 n.3 (citing *Myers & Myers, Inc. v. U.S. Postal Serv.*, 527 F.2d 1252, 1256 (2d Cir. 1975) and *Hui Yu v. U.S. Dep't of Homeland Sec.*, 568 F. Supp. 2d 231, 235 (D. Conn. 2008)))

Judge Aaron also identifies "additional, independent reasons" for the dismissal of Kotlyarsky's claims. (*Id.* at 8) First, Kotlyarsky is collaterally estopped from pursuing his claims, "[i]nsofar as [his] Complaint raises the same claims as were asserted in his Section 2255 motion, which was denied in its entirety." (*Id.*; *see also id.* ("The Second Circuit has 'long held that a criminal conviction, whether by jury verdict or guilty plea, constitutes estoppel in favor of

the United States in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case." (quotation marks omitted) (quoting *United States v. U.S. Currency in Amount of \$119,984.00, More or Less*, 304 F.3d 165, 172 (2d Cir. 2002))))

Judge Aaron also finds that Kotlyarsky's Section 1983 claims fail under the doctrine established in *Heck v. Humphrey*, 512 U.S. 477 (1994), which bars Section 1983 claims arising out of a plaintiff's criminal conviction, "unless 'the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.'" (R&R (Dkt. No. 24) at 9 (quoting *Heck*, 512 U.S. at 487))

Finally, Judge Aaron finds that Kotlyarsky's state law claims would fail on the merits. With respect to Kotlyarsky's malicious prosecution claim, Judge Aaron notes that Kotlyarsky must allege four elements: "(1) initiation of a proceeding against the plaintiff; (2) termination of that proceeding in his favor; (3) lack of probable cause; and (4) malice." (*Id.* at 9- 10 (citing *Manganiello v. City of New York*, 612 F.3d 149, 161 (2d Cir. 2010))) Because Kotlyarsky pled guilty in the underlying criminal proceeding, he cannot show that there was a termination of that proceeding in his favor. (*Id.* at 10) As to Kotlyarsky's emotional distress claim, Judge Aaron finds that Kotlyarsky has not pled facts establishing "extreme or outrageous conduct" – a necessary element – by Bharara or

Comey. (*Id.* at 10 & n. 7 (citing *A.M. ex rel. J.M. v. NYC Dep't of Educ.*, 840 F. Supp. 2d 660, 690 (E.D.N.Y. 2012) and *Calicchio v. Sachem Cent. Sch. Dist.*, 185 F. Supp. 3d 303, 3 14 (E.D.N.Y. 2016))) Judge Aaron also finds that an intentional infliction of emotional distress claim cannot be brought against a government entity such as the Department of Justice. (*Id.* at 10-11 (citing *Noel Pane v. Town of Greenburgh*, No. 07 Civ. 3216 (LMS), 2012 WL 12886971, at \*6 (S.D.N.Y. Mar. 21, 2012)))

In his objections, Kotlyarsky does not challenge any of the R&R's legal conclusions regarding the viability of his claims. Instead, he asks for leave to amend, arguing that he "was imprisoned without any evidence and [is] able to demonstrate through documentary evidence that the Government did not meet the requisite burden of proof and my [ criminal] case should have been dismissed." (Pltf. Obj. (Dkt. No. 25) ¶¶ 3-4; *see also id.*, ¶ 32 ("If this court will allow me to re-plead my case[,] I will demonstrate that improper actions were taken by the government, and that I did a noble deed to save the life of Oleg Mitnik."))

Because Kotlyarsky does not challenge Judge Aaron's legal conclusions, or otherwise take issue with Judge Aaron's legal analysis, the R&R will be reviewed for clear error.

Having reviewed the R&R, this Court finds no error in Judge Aaron's conclusion that Kotlyarsky's claims must be dismissed. As Judge Aaron finds, Section 1983 claims may not be brought against a

federal agency or federal officials acting in their official capacity. Moreover, Kotlyarsky's state law claims are subject to the FTCA, and there is no evidence that he has exhausted his administrative remedies. Kotlyarsky's claims are also barred by collateral estoppel, as a result of his convictions and the adverse ruling on his Section 2255 motion. For all these reasons, the Complaint will be dismissed.

### III. LEAVE TO AMEND

District courts "ha[ve] broad discretion in determining whether to grant leave to amend," *Gurary v. Winehouse*, 235 F.3d 792, 801 (2d Cir. 2000), and "leave to amend should be freely granted when 'justice so requires.'" *Pangburn v. Culbertson*, 200 F.3d 65, 70 (2d Cir. 1999) (quoting Fed. R. Civ. P. 15(a)). Leave to amend may properly be denied in cases of "'undue delay, bad faith[,] or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc.'" *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). "'Where the possibility exists that [a] defect can be cured,' leave to amend 'should normally be granted' at least once. *Wright v. Ernst & Young LLP*, No. 97 Civ. 2189 (SAS), 1997 WL 563782, at \*3 (S.D.N.Y. Sept. 10, 1997), *aff'd*, 152 F.3d 169 (2d Cir. 1998) (citing *Oliver Schs., Inc. v. Foley*, 930 F.2d 248, 253 (2d Cir. 1991)). However, "'[w]here it appears that granting leave to amend is unlikely to be productive, ... it is not an abuse of discretion to deny leave to amend.'" *Lucente v.*

*Int'l Bus. Machs. Corp.*, 310 F.3d 243, 258 (2d Cir. 2002) (quoting *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993)).

As noted, Kotlyarsky has requested leave to amend in order to present new evidence to the Court. (See Pltf. Obj. (Dkt. No. 25) ¶¶ 3-5, 32, 35) He does not explain, however, how an amendment would overcome the legal obstacles to his claims that are discussed above and in the R&R. In his R&R, Judge Aaron recommends that Kotlyarsky's claims be dismissed without leave to amend, because "any attempt to amend would be futile." (R&R (Dkt. No. 24) at 11) This Court agrees that any amendment would be futile. Accordingly, leave to amend will be denied.

## CONCLUSION

For the reasons stated above, Judge Aaron's R&R is adopted in its entirety, and the Complaint is dismissed with prejudice. The Clerk of Court is directed to terminate the motion (Dkt. No. 19), and to close this case.

Dated:        New York, New York  
                  September 28, 2022

SO ORDERED.

/s/  
Paul G. Gardephe  
United States District Judge

## **APPENDIX C**

### **UNITED STATES DISTRICT COURT Southern District of New York**

**UNITED STATES OF AMERICA**

**v.**

**BORIS KOTLYARSKY**

### **JUDGMENT IN A CRIMINAL CASE**

Case Number: 1:(S1)16-CR-215-01 (LAK)  
USM Number: 77477-054

Mr. Matthew J. Kluger, Esq. (718) 293-4900  
Defendant's Attorney

#### **THE DEFENDANT:**

pleaded guilty to count(s) (S1) One & (S1)Two

pleaded nolo contendere to count(s) \_\_\_\_\_ which was accepted by the court.

was found guilty on count(s) \_\_\_\_\_ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

**Title & Section  
18 U.S.C. §1951**

18 U.S.C. §1951

**Nature of Offense**

Conspiracy to Commit Extortion  
Extortion

**Offense Ended**

1/14/2016  
1/14/2016

**Count**

(S1)One  
(S1)Two

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s)

---

Count(s) All Open  is  are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

[DATE STAMP]

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #: \_\_\_\_\_  
DATE FILED: JUN -6 2017

May31,2017  
Date of Imposition of Judgment

/s/  
Signature of Judge

Hon. Lewis A. Kaplan. U.S.D.J.  
Name and Title of Judge

Date 6/5/17

**IMPRISONMENT**

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

41 Months incarceration on each count, the terms to run concurrently.

✓ The court makes the following recommendations to the Bureau of Prisons:

That consistent with the policies of the BOP, the defendant be designated to the Danbury, CT facility. It is additionally recommended that the defendant be given a medical evaluation regarding whether or not he should be prescribed Lipitor or another statin.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at \_\_\_\_\_  a.m.  p.m. on \_\_\_\_\_

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on \_\_\_\_\_

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

**RETURN**

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_ at \_\_\_\_\_, with a certified copy of this judgment.

---

UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

## **SUPERVISED RELEASE**

Upon release from imprisonment, you will be on supervised release for a term of:

### **3 Years with the following special conditions:**

The defendant shall participate in a substance abuse program approved by the U.S. Probation Office, which may include testing to determine whether he has reverted to using drugs or alcohol. The Court authorizes the release of available drug treatment evaluations and reports to the substance abuse treatment provider as approved by the probation officer. The defendant will contribute to the cost of services rendered in an amount to be determined by the probation officer based on his ability to pay or the availability of third party payment.

The defendant shall report to the nearest probation office within 72 hours after he is released from custody.

The mandatory drug testing condition is suspended because the Court finds a low risk of substance abuse.

## **MANDATORY CONDITIONS**

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.

3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
  - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ✓ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5.  You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6.  You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

## **STANDARD CONDITIONS OF SUPERVISION**

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.

5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the

probation officer related to the conditions of supervision.

**U.S. Probation Office Use Only**

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: [www.uscourts.gov](http://www.uscourts.gov).

Defendant's Signature \_\_\_\_\_ Date \_\_\_\_\_

**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<b>Assessment</b>
<b>TOTALS</b>	\$ 200
<b>JVTA Assessment*</b>	\$
<b>Fine</b>	\$
<b>Restitution</b>	\$

The determination of restitution is deferred until

---

\* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

\_\_\_\_\_. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

**Name of Payee**

**Total Loss\*\***

**Restitution Ordered**

**Priority or Percentage**

**TOTALS \$\_\_\_\_ \$\_\_\_\_**

Restitution amount ordered pursuant to plea agreement \$\_\_\_\_\_

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or

---

\*\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
  - the interest requirement is waived for the  fine  restitution.
  - the interest requirement for the  fine  restitution is modified as follows:

#### **SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A  Lump sum payment of \$ 200 due immediately, balance due

not later than \_\_\_, or  
in accordance  C,  D,  E, or F below; or

B  Payment to begin immediately (may be  C,  D, or  F below); or

C  Payment in equal \_\_\_\_ (*e.g., weekly, monthly, quarterly*) installments of \$\_\_\_\_ over a period of \_\_\_\_ (*e.g., months or years*), to commence \_\_\_\_ (*e.g., 30 or 60 days*) after the date of this judgment; or

D Payment in equal \_\_\_\_ (*e.g., weekly, monthly,*

*quarterly) installments of \$ \_\_\_\_\_ over a period of (e.g., months or years), to commence (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or*

E  Payment during the term of supervised release will commence within \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

**MOTION UNDER 28 U.S.C. § 2255 TO VACATE,  
SET ASIDE, OR CORRECT SENTENCE BY A  
PERSON IN FEDERAL CUSTODY**

United States District Court  
Southern District of NY

Name (under which you were convicted):  
Boris Kotlyarsky

Docket or Case No.:

Place of Confinement:  
FCI Danbury

Prisoner No.:  
45680-054

UNITED STATES OF AMERICA v. Kotlyarsky

**MOTION**

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

United States District Court, Sourthern District of NY,  
500 Pearl Street, NY, NY 10007

(b) Criminal docket or case number (if you know):  
16-cr-215 (LAK)

2. (a) Date of the judgment of conviction (if you know):

June 6, 2017

(b) Date of sentencing:  
May 31, 2017

3. Length of sentence:  
41 months

4. Nature of crime (all counts):

Hobbs Act Extortion, Conspiracy to commit Hobbs Act Extortion, and aiding and abetting under 18 U.S.C. § 1951 & 2.

5. (a) What was your plea? (Check one)

(1) Not guilty

(2) Guilty

(3) Nolo contendere (no contest)

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to? \_\_\_\_\_

6. If you went to trial, what kind of trial did you have? (Check one)

Jury

Judge only

7. Did you testify at a pretrial hearing, trial, or post-trial hearing?

Yes  No

8. Did you appeal from the judgment of conviction?

Yes  No

9. If you did appeal, answer the following:

(a) Name of court: N/A

(b) Docket or case number (if you know): \_\_\_\_\_

(c) Result: \_\_\_\_\_

(d) Date of result (if you know): \_\_\_\_\_

(e) Citation to the case (if you know): \_\_\_\_\_

(f) Grounds raised: \_\_\_\_\_

(g) Did you file a petition for certiorari in the United States Supreme Court?

Yes  No

If "Yes" answer the following:

(1) Docket or case number (if you know): N/A

(2) Result: \_\_\_\_\_

(3) Date of result (if you know): \_\_\_\_\_

(4) Citation to the case (if you know): \_\_\_\_\_

(5) Grounds raised: \_\_\_\_\_

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes  No

11. If you answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: N/A

(2) Docket or case number (if you know): \_\_\_\_\_

(3) Date of filing (if you know): \_\_\_\_\_

(4) Nature of the proceeding: \_\_\_\_\_

(5) Grounds raised: \_\_\_\_\_

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?  
Yes        No   

(7) Result: \_\_\_\_\_

(8) Date of result (if you know): \_\_\_\_\_

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: \_\_\_\_\_

(2) Docket or case number (if you know): \_\_\_\_\_

(3) Date of filing (if you know): \_\_\_\_\_

(4) Nature of the proceeding: \_\_\_\_\_

(5) Grounds raised: \_\_\_\_\_

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?  
Yes        No   

(7) Result: \_\_\_\_\_

(8) Date of result (if you know): \_\_\_\_\_

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes        No      
(2) Second petition: Yes        No      
(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not: \_\_\_\_\_

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts

supporting each ground.

**GROUND ONE:**

Denial of Right to Effective Representation Based on  
Counsel's Unprofessional Errors Which Prejudiced the  
Defense

(a) Supporting facts (Do not argue or cite law. Just  
state the specific facts that support your claim.):  
See Ryder in Support of Motion to Vacate Under  
28 U.S.C. § 2255, ("Ryder"), at p. 23-48).

(b) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction,  
did you raise this issue?  
Yes  No   
(2) If you did not raise this issue in your direct  
appeal, explain why:

Ineffective Assistance of Counsel claims are properly  
raised in the first habeas case. Massaro v US, 538  
US 500 (2003)

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction  
motion, petition, or application?

Yes  No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or  
petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if  
available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition,  
or application?

Yes  No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes  No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: \_\_\_\_\_

#### GROUND TWO:

Denial of Right to Effective Representation Based on Government Interference With Counsels' Ability to Conduct Defense

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.)

See Ryder (p. 48-51).

(b) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes  No

(2) If you did not raise this issue in your direct appeal, explain why:

Ineffective Assistance of Counsel claims are properly raised in the first instance in habeas cases. See e.g., Marraro v US, *supra*.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?  
Yes  No

(2) If your answer to Question (c)(1) is "Yes," state:  
Type of motion or petition: \_\_\_\_\_  
Name and location of the court where the motion or petition was filed: \_\_\_\_\_  
Docket or case number (if you know): \_\_\_\_\_  
Date of the court's decision: \_\_\_\_\_  
Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?  
Yes  No

(4) Did you appeal from the denial of your motion, petition, or application?  
Yes  No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?  
Yes  No

(6) If your answer to Question (c)(4) is "Yes," state:  
Name and location of the court where the appeal was filed: \_\_\_\_\_  
Docket or case number (if you know): \_\_\_\_\_  
Date of the court's decision: \_\_\_\_\_  
Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: \_\_\_\_\_

**GROUND THREE:**

The Government Violated Brady By Withholding Evidence That Was Favorable To Petitioner and

Material To His Sentence

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): See Ryder (p. 52-55).

(b) Direct appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes  No

(2) If you did not raise this issue in your direct appeal, explain why:

The materials suppressed by the government were not discoverable by Petitioner with the exercise of due diligence until after the period of appeal was completed and alternatively due to ineffective assistance.

(c) Post-Conviction Proceeding:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes  No

(2) If your answer Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes  No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes  No

(5) If your answer to Question (c)(4) is "Yes," did

you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (c)(4) is "Yes," state: Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: \_\_\_\_\_

GROUND FOUR: \_\_\_\_\_

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: \_\_\_\_\_

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes  No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes  No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes  No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes  No

(6) If your answer to Question (c)(4) is "Yes," state: Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: \_\_\_\_\_

13. Is there any ground in this motion that you have **not** previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

Both grounds were not previously raised as they present ineffectiveness claims which are properly raised in the first instance in a habeas case. See e.g., Massaro v US, *supra*. Ground three was not discovered until after the period for filing appeal was completed, and alternatively, it was not raised due to ineffective assistance of counsel in connection with the decision of

whtether to appeal.

14. Do you have any motion, petition, or appeal **now pending** (filed and not decided yet) in any court for the judgment you are challenging?

Yes  No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. \_\_\_\_\_

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At the preliminary hearing: \_\_\_\_\_

(b) At arraignment and plea:

Tony Mirvis, Brooklyn, NY; Mark Furman, NY, NY

(c) At trial:

N/A

(d) At sentencing:

Alvin Entin, Entin & Della Fera, PA, Ft. Lauderdale Florida; Dennis Ring, Law Office of Dennis Ring, Whitestone, NY.

(e) On appeal:

N/A

(f) In any post-conviction proceeding:

N/A

(g) On appeal from any ruling against you in a post-conviction proceeding: \_\_\_\_\_

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes  No

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes  No   
(a) If so, give name and location of court that imposed the other sentences you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence: \_\_\_\_\_

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future?

Yes  No

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.

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\* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;

Motion is timely filed

Therefore, movant asks that the Court grant the following relief:

vacate and resentence and alternatively set the matter for an evidentiary hearing. See Ryder (p. 53). or any other relief to which movant may be entitled.

/s/  
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on 02/21/018 (month, date, year).

Executed (signed) on 02/17/2018 (date).

/s/  
Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion. \_\_\_\_\_

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- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

IN FORMA PAUPERIS DECLARATION

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[Insert appropriate court]

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## **APPENDIX D**

### **UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of January, two thousand twenty four,

Before:      Reena Raggi,  
                  Richard J. Sullivan,  
                  Eunice C. Lee,

Circuit Judges.

Boris Kotlyarsky,  
Plaintiff - Appellant,

v.

United States Department of Justice, Preet Bharara, in his official capacity, James Comey, in his official capacity,

Defendants - Appellees.

### **ORDER**

Docket No. 22-2750

Appellant Boris Kotlyarsky having filed a petition for panel rehearing and the panel that

determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is  
DENIED.

For The Court:

Catherine O'Hagan Wolfe,  
Clerk of Court

**Additional material  
from this filing is  
available in the  
Clerk's Office.**