07-3042-cr

To Be Argued By:
KARL METZNER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-3042-cr

UNITED STATES OF AMERICA,

Appellant,

—v.—

JEFFREY STEIN, JOHN LANNING, RICHARD SMITH, JEFFREY EISCHEID, PHILIP WIESNER, MARK WATSON, LARRY DELAP, STEVEN GREMMINGER, GREGG RITCHIE, RANDY BICKHAM, CAROL G. WARLEY, CARL HASTING, RICHARD ROSENTHAL,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE UNITED STATES OF AMERICA

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REPLY BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

In its principal brief, the Government explained the numerous reasons why the District Court erred as a matter of law in dismissing Indictment S1 05 Cr. 888 (LAK) as to thirteen defendants, regardless of the correctness of the District Court's factual findings, while explaining why several of those findings were not supported by the record. The defendants, joined by several *amici*, attempt to avoid the force of these arguments by asking this Court not to consider them, and by raising new theories in support of

the District Court's extraordinary decision to dismiss the Indictment. None of these arguments undermine the inescapable legal conclusion that KPMG's decision not to pay the defendants' attorneys fees after they were indicted did not violate the defendants' constitutional rights, and, accordingly, that the District Court erred in dismissing the Indictment.

First, apparently concerned about the merits of the Government's legal arguments, the defendants repeatedly resort to claims of Government waiver. Such claims are groundless. The Government did not waive any of the arguments it now makes in this Court. It contended below that the appropriate remedy for any inappropriate pressure by the Government was to allow KPMG to reconsider its decision regarding payment of the defendants' fees, with the assurance that such payment would not be viewed negatively by the Government. Similarly, the Government articulated its state action argument in its submissions to the District Court in connection with the defendants' suppression motion, and in its appellate briefs in the tandem appeal in *United States* v. *Smith and Watson*, No. 06-3999-cr (hereinafter, the "*Smith* appeal"), all of which the District Court explicitly considered in its July 2007 opinion dismissing the Indictment. Finally, the Government did not waive any arguments relating to the fact that four defendants changed attorneys after KPMG stopped paying their attorneys fees. Any "right to counsel of choice" claim derives from the effects and significance of KPMG's decision, which the Government has squarely (and repeatedly) addressed.

Second, the new theories advanced by the defendants and *amici* avail them nothing. The defendants' retooled procedural due process claims fail because they must be evaluated, as with substantive due process claims, using a "fundamental right" model, which the defendants' claim of access to third-party funds simply cannot satisfy. Moreover, the federal courts' supervisory power does not extend to policing the conduct of the executive branch in conducting its investigations, unless that conduct violates the defendants' constitutional rights, which this investigation did not.

The Government investigated KPMG consistent with the policies of the Department of Justice ("DOJ"), and neither the investigation nor the DOJ's policies placed any improper coercion on KPMG in deciding whether to pay the legal fees of its partners and employees. KPMG was not a state actor in making that decision, which in any event did not violate the defendants' Sixth Amendment rights. The Government's conduct was not "outrageous"; it did not "shock the conscience"; and it certainly did not justify the extreme sanction of dismissal. The District Court's decision should be reversed, and the Indictment reinstated as to the thirteen defendants.

ARGUMENT

POINT I

The Government Cured Any Sixth Amendment Violation

The Government's unconditional declaration in open court that KPMG would suffer no adverse consequences if it chose to pay the defendants' legal fees cured any

violation of the defendants' Sixth Amendment rights caused by the Thompson Memorandum and the United States Attorneys Office's ("USAO's") statements at the meeting of February 25, 2004. Any Sixth Amendment violation attributable to the Government came not from KPMG's decision not to pay attorneys fees for indicted partners and employees, but from the Government's influence on KPMG's decisionmaking. Once any such pressure was eliminated, KPMG's position from that point forward was entirely its own. And given the additional time afforded the defendants to review documents and prepare for trial, combined with the extraordinary accommodations created at taxpayer expense to aid the defendants' preparation, no further sanction was warranted.

A. The Government Did Not Waive The Cure Argument

The defendants argue that the Government failed to raise below the argument that it cured any violation of the defendants' Sixth Amendment rights, and has therefore waived it. (*See, e.g.*, DeLap Br. 52). The record demonstrates the contrary.*

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* The thirteen defendants filed six briefs. Four defendants (Eischeid, Ritchie, Watson, and Hasting) filed their own briefs; each will be cited as "[Name] Br." Five defendants (Stein, Lanning, Smith, Bickham, and Rosenthal) filed one joint brief, which will be cited as "Stein Br.", while the remaining four defendants (DeLap, Gremminger, Warley, and Wiesner) filed another joint brief, which will be cited as "DeLap Br." "Gov't Br." refers to the Government's principal brief on appeal in the

Even before the May 2006 Fee Hearing, the Government argued that the proper remedy for any Sixth Amendment violation found by the District Court

> would be to have KPMG reconsider its decision without reference to the Thompson memo provision concerning the advancement of legal fees. In this setting, the Government would represent to KPMG, as it did previously to the Court, that a decision to resume payment of attorneys' fees would not be a breach of the deferred prosecution agreement [("DPA")], and would not be viewed as such.

(Stein A. 96-97, Dkt. 459 at 2). After the Fee Hearing, the Government again submitted that the most narrowly tailored remedy, consistent with the Supreme Court's directive in *United States* v. *Morrison*, 449 U.S. 361 (1981), was for KPMG to be advised that it could advance attorneys fees to the defendants without fear of repercussions from the Government. (Stein A. 106, Dkt. 510 at 60-63). Indeed, the Government specifically offered to "advise KPMG more formally, in accordance with the Government's prior representations to this Court, *see* 3/30/2006 Tr. 37, that the Government would not consider a decision by KPMG to advance or indemnify the defen-

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instant matter; "Stein A." refers to the joint appendix submitted with that brief; and "Gov't *Smith* Br." refers to the Government's principal brief on appeal in *United States* v. *Smith and Watson*, No. 06-3999-cr.

dants' legal fees to be a violation of the DPA." (*Id.* at 62-63).[*]

The District Court squarely rejected this proposed remedy in its June 26, 2006, opinion. *See United States* v. *Stein*, 435 F. Supp. 2d 330, 374 (S.D.N.Y. 2006) ("*Stein I*"). The District Court determined that any proposed remedy had to result not only in the payment of the defendants' attorneys fees from that point forward (by someone other than the defendants), but also in reimbursement of "defense costs already incurred." *Id.* The Government's proposed remedy failed to accomplish that objective, and for this reason was summarily rejected. *Id.*

In May 2007, after the District Court's efforts to force KPMG into a summary proceeding were rejected by this Court via writ of mandamus, the District Court asked the parties for their views on the appropriate remedy for the violations it had found the previous year. (Stein A. 199-

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[*] Some defendants suggest that KPMG may not have known of the Government's position on this issue. (*See* DeLap Br. 52). But not only was an attorney for KPMG present as an observer at the March 30, 2006, conference, as of April 25, 2006, KPMG's counsel had entered an appearance as part of its efforts to modify a Rule 17(c) subpoena issued in connection with the Fee Hearing. (Stein A. 95, Dkt. 450). Having been designated by the Southern District of New York's Electronic Case Filing ("ECF") system as "Attorneys To Be Noticed," KPMG's counsel thereafter received e-mail notifications of the Government filings discussed above and had the ability to view them electronically without charge. (Stein A. 27-28).

200, Dkt. 973). In response, the Government advised the District Court that it maintained its position that *Stein I* was wrongly decided, but that, if the District Court were to stand by its earlier decision, dismissal was the only appropriate remedy. (Stein A. 213, Dkt. 1051, at 1-2). The Government had, quite properly, declined the District Court's extraordinary suggestion that it should pressure KPMG—using the threat of indictment—to pay the defendants' attorneys fees.* And, with KPMG on record as stating in no uncertain terms that it did not intend to pay the defendants' fees going forward, no other source of funds for those fees was forthcoming.

In its response, the Government explicitly renewed all the arguments it had made in opposing dismissal the previous year, and incorporated them by reference. (*See id.* at 3 n.1). In particular, the Government repeated its earlier argument that, even "assuming the correctness of the [District] Court's findings" in June 2006, "'the appropriate

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* The defendants hypocritically complain that the Government failed to coerce KPMG into paying their fees, even as they charge the Government with coercive conduct that they claim violated their own rights: "[D]espite the leverage it held by virtue of the DPA . . . the government refused to encourage KPMG to pay appellees' fees." (Stein Br. 96-97). This Court has previously noted the impropriety of this suggestion. *See Stein* v. *KPMG, LLP*, 486 F.3d 753, 757 (2d Cir. 2007) (recognizing that District Court left open possibility of dismissal of indictment "as an incentive for the government to strongarm KPMG to advance appellees' defense costs").

remedy would be to have KPMG reconsider its decision to advance fees to the defendants without reference to the Thompson memo or fear that doing so would constitute a breach of KPMG's deferred prosecution agreement.'" (*Id.* at 6 (quoting earlier submission)). The Government did not also note the effects of the passage of time since the June 2006 decision, but it would have been futile to do so. The passage of additional time was irrelevant under the District Court's reasoning, as it had held that only a remedy resulting in the third-party payment of the defendants' past, present, and future attorneys fees would suffice.

B. Dismissal Was Not The Most Narrowly-Tailored Remedy To Address Any Sixth Amendment Violation

As the Government explained in its principal brief, any deprivation of resources attributable to the Government lasted only until March 30, 2006, when the Government made clear that KPMG would not face adverse consequences if it chose to pay the defendants' attorneys fees. (Gov't Br. 31-44). The District Court's polarized view of the potential remedies—either full payment of defendants' attorneys fees by someone other than the defendants, or dismissal of the Indictment—ignored a more appropriate, narrowly-tailored choice between those extremes: additional preparation time, aided by the Government's accommodations.

The Government took extraordinary steps (some at its own initiative, some pursuant to court order to which it made no objection) to facilitate the defendants' understanding and analysis of the evidence. It designated its

exhibits many months in advance of trial, thereby identifying the most important documents, which comprise a tiny fraction of the overall total produced in discovery. It named its trial witnesses, so the defendants could interview those willing to speak with them. And it produced the prior statements of those witnesses far sooner than required by 18 U.S.C. § 3500, giving the defendants months to prepare for cross-examination.[*] On top of all that, the Government at its own expense created an Internet-accessible digital database of the 22 million pages of discovery, to facilitate searches and browsing, which greatly reduced the burden on the defendants in preparing for trial. Such efforts alleviated the impact of any temporary deprivation of assets, and are appropriately considered when evaluating the defendants' Sixth Amendment claims. *See United States* v. *Cronic*, 466 U.S. 648, 663-64 (1984) (noting mitigating effects of "time devoted by the Government to the assembly, organization, and summarization of the thousands of written records," which "unquestionably simplified the work of defense counsel in identifying and understanding the basic character of the defendants' scheme").

Despite these efforts, and despite the fact that they had nearly two years to prepare for trial (and will have several months more if the Indictment is reinstated), the defen-

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[*] Section 3500 of Title 18, commonly known as the Jencks Act, requires the Government to disclose prior statements of its witnesses after those witnesses testify on direct examination. In practice, the USAO usually provides such material shortly before the beginning of trial.

dants continue to cling to the idea that the only sufficient remedy would be full third-party payment of all their past and future attorneys fees. But under *Morrison*, any remedy must be tailored to the violation, and the violation here, as found by the District Court, was the pressure by the Government on KPMG's decisionmaking. Having removed any such pressure, the Government is responsible for, at most, KPMG's refusal to pay fees for a five- to seven-month period.

Undaunted, the defendants persist that dismissal is still required, because that period was somehow so vitally important that no one can know what extraordinary efforts the defendants might have undertaken to prepare for trial during that period of time, and so the five- to seven-month deprivation of funds "infected the entire framework" of the proceedings. (Stein Br. 98). But it requires neither speculation nor second sight to know what the defendants would have done; common sense will do. They would have conducted more analyses of the documents, interviewed more witnesses, and spent more time with their attorneys.[*] To be sure, *Morrison* recognizes the possibility of dismissal, where the defendants have been irreparably prejudiced and no other relief can address that injury. *See* 449 U.S. at 365. But the defendants' *ipse dixit* declarations

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[*] Not that the defendants' attorneys were inactive during this period. To the contrary, as the docket entries attest, defense counsel were engaged in a vigorous motions practice and litigation regarding protective orders, discovery, venue, demands for bills of particulars, bail issues, and numerous other matters. (Stein A. 36-85).

that the lack of fees for a comparatively brief window of time unalterably prejudiced their ability to defend themselves cannot be squared with the facts. Because dismissal of the Indictment should be a last resort, the District Court should instead have given the defendants additional time to prepare their defense, which would have ameliorated any harm caused by the deprivation of resources for a few months.

The defendants object that the loss of funds precluded them from hiring expert witnesses, and so only a remedy that includes funds to pay such consultants can suffice. (Stein Br. 87; DeLap Br. 36). But privately-retained experts are not the only means available to ensure that the defendants have an adequate understanding of the issues. In the first place, many of the defendants are alleged to have designed and created the shelters in question themselves, so their need for expert assistance to understand them is questionable. Further, the Government has produced in discovery several expert reports prepared for KPMG in connection with civil suits relating to the same tax shelters at issue here, giving the defendants another source of expertise on these subjects. Finally, the District Court retains the discretion under Rule 706 of the Federal Rules of Evidence to hire an independent expert to advise it and the parties on the relevant issues.* If the defendants

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* Experts hired by the court under Rule 706 in criminal cases are paid by the Department of Justice. *See Payment of Court-Appointed Expert Witness - Criminal Proceeding*, 59 Comp. Gen. 313, 1980 WL 17983 (Mar. 21, 1980). Rule 706 is generally used to retain an expert to

sincerely need expert advice on the issues for trial, Rule 706 provides a potential mechanism for the District Court to provide it. That such an expert would not be the equivalent of a retained defense consultant does not render it insufficient. When faced with a pretrial constitutional violation attributed to the Government, the objective of the court in fashioning a remedy is not to place the defendants in precisely the same position that they would have occupied otherwise, but to mitigate the effects of the violation sufficiently to ensure that the defendants receive a fair trial. Making an expert available to the defendants would accomplish that goal.

The defendants place heavy reliance on the District Court's finding that "KPMG refused to pay the fees of these defendants *after they were indicted* as a result of the Thompson Memorandum and the actions of the USAO." *United States* v. *Stein*, 495 F. Supp. 2d 390, 404 (S.D.N.Y. 2007) ("*Stein IV*") (emphasis in original); *accord id.* at 407 ("KPMG cut off payment of defense costs to anyone who was indicted for one reason and one reason alone—the Thompson Memorandum and the related actions of the USAO. In their absence, KPMG would have paid every penny, just as it always had done before."). But the District Court did not find—and could not find—that KPMG would have continued to voluntarily pay the defendants' attorneys fees forever, without limitation, regardless of new developments or revelations. Indeed, no such conclu-

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advise the judge, but, under these unique circumstances, the District Court has the discretion to hire an expert to advise the parties as well.

sion is possible given that, as this Court has noted previously, "KPMG's alleged 'uniform practice,' *Stein I*, 435 F. Supp. 2d at 356, of paying the legal fees for indicted employees and partners . . . appears to consist of a single instance in which KPMG paid the legal fees of two partners indicted and convicted in a 1974 criminal case." *Stein* v. *KPMG*, *LLP*, 486 F.3d at 762 n.3.

No court can purport to predict the future, particularly on such a sparse record of past conduct. Too much is unknown, and too many factors can change. Indeed, the statements made by KPMG's counsel at the Fee Hearing, along with the unequivocal declarations by KPMG in its submissions in the ancillary proceeding, demonstrate that KPMG retained its voluntary indemnification policy for precisely this reason. (*See, e.g.*, Stein A. 137, Dkt. 701 at 4-5 ("KPMG would not have committed itself, two years before any indictment was issued, to an open-ended obligation to pay millions of dollars of legal fees to an unknown number of defendants without regard to the ultimate facts or the charges that would be issued by the grand jury and without being able to foretell the impact the investigation would have on the firm.")).

All the evidence demonstrates that, after executing the DPA and admitting criminal misconduct that cost the firm $456 million in fines, penalties, and restitution, KPMG exercised its independent business judgment to refuse to pay the defendants' post-indictment attorneys fees. To the extent that the District Court's findings could be interpreted as concluding, as a factual matter, that absent the Thompson Memorandum and the USAO's conduct, KPMG would never, under any circumstances, have

changed its voluntary policy regarding payment of attorneys fees, regardless of what evidence came to light concerning the conduct of the indicted defendants and the impact of that conduct on the firm, that finding is clearly erroneous. (*See* Gov't Br. 34-40). Because KPMG decided not to pay the defendants' attorneys fees even after the Government made it clear that no negative repercussions would result if they did so, the Government's statements on March 30, 2006, and thereafter, coupled with its extraordinary accommodations to aid the defendants' trial preparation, cured any undue influence from the Thompson Memorandum and the USAO's February 2004 conduct.

POINT II

KPMG's Decision Not To Pay The Defendants' Attorneys Fees Was Not State Action

Because KPMG made the ultimate decision regarding the defendants' legal fees, that decision was not the product of state action, and so did not violate any constitutional rights held by the defendants. Contrary to the defendants' claims, the Government did not waive this argument below, which is legally dispositive of the issues in this case even if the District Court's factual findings are accepted.

A. The Government Did Not Waive The State Action And Coercion Arguments

Preliminarily, the defendants suggest that the Government failed to raise the state action and coercion arguments below, and therefore waived them. (Stein Br. 77;

Ritchie Br. 38-39). In fact, the Government made the state action argument in briefing on the suppression issue before *Stein I* was issued (*see* Stein A. 114-15, Dkt. 569 at 14-24), and the District Court noted that it had reviewed the arguments in the Government's suppression brief before ruling on the constitutional issues presented in the dismissal motion. *See Stein I*, 435 F. Supp. 2d at 353 n.97 (discussing Government's arguments in "brief on another motion").

Further, in *Stein IV*, the District Court noted that it had considered the Government's arguments in the *Smith* appellate briefs before dismissing the Indictment. *See* 495 F. Supp. 2d at 393 & n.1 (referencing the Government's principal brief in the *Smith* appeal and stating that "the Court has reconsidered *Stein I* carefully in light of the government's arguments"). In the *Smith* brief, the Government argued extensively that KPMG's decision to condition and limit the defendants' attorneys fees did not qualify as state action. (*See* Gov't *Smith* Br. 80-97). The record thus reflects that the Government raised, both sides briefed, and the District Court considered fully, the state action argument before the Indictment was dismissed.

As for the coercion issue, the Government argued at length before the District Court that KPMG made its own decision, exercising its independent business judgment, when deciding not to pay the defendants' fees once they were indicted. (*See, e.g.*, Stein A. 106, Dkt. 510 at 9-11). Indeed, the District Court's decision in *Stein I* focuses almost entirely on the issue of whether the Government coerced KPMG's decisionmaking.

In any event, as to this and any other arguments that the defendants claim that the Government waived, this Court retains the discretion to consider such arguments even if not preserved below, and will exercise that discretion most generously where, as here, the issues raise questions of law, rather than fact, and the factual record has been fully developed by both sides. *See, e.g.*, *Paese* v. *Hartford Life Accident Ins. Co.*, 449 F.3d 435, 447 (2d Cir. 2006) ("we retain broad discretion to consider issues not raised below because the waiver rules are prudential and not jurisdictional"); *Sniado* v. *Bank Austria AG*, 378 F.3d 210, 213 (2d Cir. 2004) ("We have exercised this discretion where necessary to avoid a manifest injustice or where the argument presents a question of law and there is no need for additional fact-finding. . . . Sniado's alternative theory, however, is purely legal and requires no further development of the record. Therefore, we exercise our discretion to reach the merits.").

B. The State Action Doctrine Applies To The Defendants' Claims

The defendants suggest that the state action doctrine does not apply because they purport to challenge the Government's conduct, not KPMG's. (Stein Br. 77; DeLap Br. 32). But despite their protestations to the contrary, the fact remains that the defendants claim injury from KPMG's conduct, not the Government's. It was KPMG that initially paid the defendants' attorneys fees, and it was KPMG that decided to limit and then terminate those payments. Indeed, the defendants concede that had KPMG decided to pay the defendants' post-indictment attorneys fees, the defendants would have no claim, regardless of the

Government's conduct. (Stein Br. 100). The question is whether KPMG's actions violated the defendants' constitutional rights.

The law is clear that, where third-party conduct is at issue, courts must apply the state action doctrine to determine whether that conduct could have violated the complainant's constitutional rights. "It is axiomatic that before a litigant may pursue a claim that he has been deprived of a constitutional right—including the right to due process of law—he must first establish that the challenged conduct constituted 'state action.'" *United States* v. *International Brotherhood of Teamsters (Carey)*, 156 F.3d 354, 359 (2d Cir. 1998). Indeed, another court has explicitly recognized the need to establish state action as part of a Sixth Amendment claim. In *Thompson* v. *Mississippi*, 914 F.2d 736 (5th Cir. 1990), the defendant complained that the victim had seen the defendant (post-arraignment) at the jail, and that such a viewing violated his Sixth Amendment right to counsel. *Id.* at 738. But the Fifth Circuit noted that the state had nothing to do with the victim's jail visit, and so, even though the victim had indeed seen the defendant, the court could not "attribute that conduct to the state," and thus "the incident did not rise to the level of state action." *Id.*

Defendant Ritchie argues that the District Court's finding that the Government caused KPMG not to pay the defendants' legal fees ends the inquiry, without the need to establish that KPMG's decision was state action. (Ritchie Br. 39-45). But that argument fails for the same reason. Where a private party commits the ultimate act associated with the claimed deprivation, causation is not

an issue: KPMG indisputably caused the defendants not to receive post-indictment attorneys fees from KPMG. As the Ninth Circuit has explained, "[i]n most cases involving private defendants, there is no proximate cause issue at all. Usually, it is clear that the defendants caused the plaintiff's injury. The issue is whether the particular conduct is purely private, and thus immune from section 1983 liability, or is state action." *Arnold* v. *IBM*, 637 F.2d 1350, 1356 (9th Cir. 1981). As the Supreme Court has recognized, once the private party has been identified as the cause of the deprivation, the next step is to determine whether the private party was a state actor when it did so. "In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action." *NCAA* v. *Tarkanian*, 488 U.S. 179, 192 (1988).

Pressing the argument that only causation, not state action, is required, defendant Ritchie attempts to analogize this situation to that presented in cases such as *Webb* v. *Texas*, 409 U.S. 95 (1972), in which the court or prosecution has intimidated a witness or otherwise interfered with the defendant's ability to put on his case. But as defendant Ritchie's codefendants recognize (*see* Stein Br. 86), those cases—which fall under the general rubric of a defendant's "right to present a defense"—implicate the Due Process Clause, not the Sixth Amendment, and are evaluated accordingly. *See, e.g.*, *United States* v. *Williams*, 205 F.3d 23, 29 (2d Cir. 2000) (discussing contours of "due process violation" based on alleged intimidation of defense witnesses); *United States* v. *Pinto*, 850 F.2d 927, 932 (2d Cir. 1988) ("Under certain circumstances, intimi-

dation or threats that dissuade a potential defense witness from testifying may infringe a defendant's due process rights."). As such, to make out a violation, a defendant must establish more than just a causal connection between the Government's conduct and the absence of the witness; the defendant must also "demonstrate that the absence of fundamental fairness infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." *United States* v. *Williams*, 205 F.3d at 29-30 (quotation omitted). As a result, even under the "right to present a defense" doctrine, mere causation is insufficient, and so defendant Ritchie's attempted analogy fails.

Similarly inapt is defendant Ritchie's attempted analogy to "intervening or superseding cause" arguments in constitutional tort cases. (Ritchie Br. 42-43). That doctrine applies to "an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." *Higazy* v. *Templeton*, 505 F.3d 161, 175 (2d Cir. 2007) (quotation omitted). In that situation, the charged defendant has caused harm to the plaintiff, but seeks to avoid responsibility because of an intervening act that overrode his own actions. For example, in *Townes* v. *City of New York*, 176 F.3d 138 (2d Cir. 1999), the plaintiff claimed an unconstitutional search and seizure, but the causal chain was broken by "the trial court's refusal to suppress the evidence, which is an intervening and superseding cause of Townes's conviction." *Id.* at 146. In *Higazy*, the plaintiff claimed that the defendant coerced his confession, and the question was whether the intervening acts of the court and prosecutor broke the causal connection between that

confession and the defendant's pretrial detention. 505 F.3d at 178.

Here, the defendants' claim is that the Government put pressure on KPMG, and that KPMG then took action detrimental to the defendants. In such a scenario, intervening cause analysis is inapplicable; rather, the issue is whether the Government is responsible for KPMG's decision, which implicates the state action doctrine.

C. KPMG's Decision Cannot Be Imputed To The Government

"'State action requires *both* an alleged constitutional deprivation caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible, *and* that the party charged with the deprivation must be a person who may fairly be said to be a state actor.'" *Cranley* v. *National Life Ins. Co.*, 318 F.3d 105, 111 (2d Cir. 2003) (quoting *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 50 (1999) (emphases in *American Mfrs. Mut. Ins. Co.*)). KPMG's decision not to pay the indicted defendants' legal fees fails both of these requirements.

The first requirement is met when, for example, a police officer makes an allegedly unlawful arrest, or a county sheriff performs an illegal eviction. In those situations, the party causing the deprivation was empowered to act under authority granted by state law (to arrest criminals or conduct evictions, respectively). Here, by contrast, the KPMG partnership made a private business decision not to pay the defendants' fees; that choice did

not involve "the exercise of some right or privilege created by the State," nor "a rule of conduct imposed by the State." Delaware law permits, but does not mandate, partnerships like KPMG to advance and/or indemnify their partners and employees for legal expenses. KPMG was not exercising any "right or privilege created by the State" when it chose not to pay the defendants' fees, and so its decision does not qualify as state action for this reason alone.

But KPMG also cannot "fairly be said to be a state actor," as is also required to show state action. To be a state actor in this situation, KPMG's decision regarding fees must be "fairly attributable" to the Government, which requires "such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Id.* (quotations omitted). This Court has recognized that "[c]haracterizing a private party as a 'state actor' is a fact-specific inquiry, and courts considering the issue typically look to such factors as the public function of the party's conduct, whether the private party acted under state compulsion, the nexus between the party's conduct and the state, and whether the party's conduct was jointly undertaken with the state." *Logan* v. *Bennington College Corp.*, 72 F.3d 1017, 1027 (2d Cir. 1995).

The Supreme Court has cautioned that no specific fact is dispositive when assessing state action:

> From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state

> action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.

Brentwood Academy v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295-96 (2001). The defendants here selectively identify a few of the numerous factors cited in various opinions as being potentially relevant, and argue that the supposed presence of those factors here supports a state action finding. But the cases on which they rely do not support their conclusions.

1. The Government Did Not Compel KPMG Not To Pay Fees

KPMG did not act under Government "compulsion," or subject to the exercise of "coercive power." As the Government explained in its principal brief, it did not unconstitutionally coerce KPMG into its decision to condition or limit the payment of the defendants' attorneys fees. (Gov't Br. 55-63). The defendants charge that this argument attempts to relitigate the factual disputes decided by the District Court, or to evade the findings made below. (Stein Br. 77-78). In fact, as to this issue, the Government argues only that the District Court applied the wrong legal standard to its assessment of the effect of the Government's conduct, thereby abusing its discretion. *See, e.g.*, *Zervos* v. *Verizon New York, Inc.*, 252 F.3d 163, 169 (2d Cir. 2001) (district court abuses discretion when "its decision rests on an error of law (such as application of the wrong legal principle)").

In light of the authority vested in the Government to investigate and prosecute crime, any decisionmaking by the subject of a criminal investigation is driven by the potential for prosecution or conviction. Given the option, most individuals and entities would never make such choices at all, preferring not to be under investigation in the first place. But the possibility of negative consequences flowing from a particular choice does not improperly coerce the subject into making that choice. If the rule were otherwise, every decision to plead guilty, to cooperate with authorities after arrest, or to take steps in hopes of avoiding indictment altogether would be unconstitutional as the product of coercion. *See McKune* v. *Lile*, 536 U.S. 24, 41 (2002) (plurality opinion) ("Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.").

The power of the Government to make prosecutive decisions regarding KPMG simply cannot transform KPMG's choice regarding the payment of the defendants' legal fees into state action. In *Tarkanian*, Jerry Tarkanian, then head basketball coach at the University of Nevada, Las Vegas ("UNLV"), argued that because the National Collegiate Athletic Association ("NCAA") held such overwhelming authority over its member schools, state-run UNLV's compliance with its demands to suspend him made the NCAA's conduct state action. Employing reasoning directly applicable here, the Supreme Court rejected that argument, emphasizing that although the NCAA had the authority to sanction the university for noncompliance, it could not force UNLV to do anything to Tarkanian—just as the Government could not and did not

direct KPMG to take any particular action on the legal fees issue. *See* 488 U.S. at 197. "UNLV could have retained Tarkanian and risked additional sanctions, perhaps even expulsion from the NCAA, or it could have withdrawn voluntarily from the Association." *Id.* at 198.

So too here. KPMG retained the decisionmaking authority over whether and to what extent to pay the defendants' legal fees, regardless of how the Government might view that decision. In such a situation, state action is lacking.

2. The Government Did Not Significantly Encourage KPMG's Decision

Defendant Ritchie relies on three cases in support of the argument that the Government "significantly encouraged" KPMG not to pay the defendants' legal fees (Ritchie Br. 48-51), but two are distinguishable, and one was reversed. In *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), the Court did not rule definitively on the presence of state action; it simply declined to hold that state action was absent, and mooted the issue by upholding the constitutionality of the regulations. *See id.* at 614. In any event, the regulations in that case overrode any collective bargaining agreements or other contracts, and prohibited the railroads from giving up the testing authority granted by the regulations. *See id.* at 615. Further, the regulations specifically gave the Government the right to receive the results of any drug tests conducted thereunder. *See id.* Faced with such clear signs of "encouragement, endorsement, and participation," the Court could not rule out state action. *See id.* at 615-16. The situation in this case is far different. The Thompson Memorandum identi-

fies a litany of factors that the Government will consider in making prosecutive decisions, and the USAO's statements at the February 25 Meeting did no more than refer to those factors and, as found by the District Court, advise that such payments would be closely scrutinized. That falls far short of the active Government encouragement of the drug testing regime in *Skinner*.

In *Chan* v. *City of New York*, 1 F.3d 96 (2d Cir. 1993), a contractor alleged that a city contract limited the allowable salaries it could pay to a level less than the minimum required by statute, and so "to win the Contracts, [the contractor] was required to make its bids based on wages below those levels." *Id.* at 107. This Court held that, if proven, such facts "would suffice to permit a finding that [the city] effectively required [the contractor] to pay less than the minimum wages required by [law]," so the contractor's actions were the responsibility of the city, and were therefore state action. *Id. Chan* is easily distinguishable. There, the contractor was forced, under the terms of a contract dictated by the city, to pay less than the wages required by statute; he was required to either violate the contract or the statute. The Government placed no such onus on KPMG. Instead, the situation here is more comparable to the one presented in *Logan*. There, the state "urged" a private college to adopt a sexual harassment policy, but had no role in the school's decisionmaking pursuant to the policy. *See* 72 F.3d at 1028. Here, the Thompson Memorandum simply notifies companies what factors the Government will consider in making prosecutive decisions, but KPMG at all times remained free to decide how to evaluate those factors and what steps to take.

Defendant Ritchie also relies on the original panel opinion in *Albert* v. *Carovano*, 824 F.2d 1333 (2d Cir. 1987), but the state action reasoning in that decision was reversed by this Court sitting *en banc*. *See Albert* v. *Carovano*, 851 F.2d 561 (2d Cir. 1988) (en banc). The full court held that legislation obligating a private college to enact a code of conduct, without requiring or even inquiring into enforcement of those rules, did not render the school's sanctions pursuant to the rules state action. *See id.* at 571. This reasoning supports the Government's position that state action is likewise absent here. (*See* Gov't *Smith* Br. 85, 95).

3. The Government Did Not Participate In KPMG's Decisionmaking Or Become Entwined In KPMG's Management

Defendant Ritchie argues alternatively that "KPMG was also a willful participant in joint activity" with the Government. (Ritchie Br. 52). But even under the facts as found by the District Court, the Government did not participate in KPMG's decisionmaking.

Notably, it was KPMG that first advised the Government of its preliminary decision to pay legal fees only for partners and employees who cooperated with the investigation, and later of its decision to terminate any payments if the individual was indicted. *See Stein IV*, 495 F. Supp. 2d at 403-04. The Government did not participate in the formulation of those policies, and did not approve or disapprove of them when advised of their contents. And another court has already recognized that the mere existence of the Thompson Memorandum does not convert the

corporate subject of an investigation into a partner of the Government. *See United States* v. *Graham*, No. 03-CR-089-RB, 2003 WL 23198793, at *3 (D. Colo. Dec. 2, 2003). Simply being under investigation and in discussions with the Government did not make KPMG a state actor.

Finally, the facts do not support defendant Ritchie's claim that the Government became "entwined in KPMG's management or control." (Ritchie Br. 54). The Government never made any management decisions on behalf of KPMG, and the Government's comments on KPMG's legal representation memo were only partly adopted by KPMG. Despite the defendants' repeated efforts to claim otherwise, KPMG made its own decisions for reasons in its own interests. "[G]overnmental oversight of a private institution does not convert the institution's decisions into those of the State, as long as the decision in question is based on the institution's independent assessment of its own policies and needs." *United States* v. *International Brotherhood of Teamsters (Senese)*, 941 F.2d 1292, 1297 (2d Cir. 1991).

The defendants' attempted parallel to constitutional tort cases reveals why KPMG's decision cannot be considered state action. If it was, then KPMG would qualify as a state actor for purposes of *Bivens* claims. If that were the case, and if in fact the decision not to pay fees were found to be a Sixth Amendment violation, KPMG could potentially be found to have had a *constitutional* obligation to pay the attorneys fees for the same individuals whose conduct led to $456 million in sanctions against KPMG, millions more in civil damages, as well as the associated public disgrace and damage to its reputation. This would be true even

though all parties agree that KPMG had no contractual or corporate obligation to pay those fees. Not only does such a scenario beggar belief, but the fact that no defendant made such a claim in their pursuit of fees from KPMG demonstrates its absurdity. KPMG's decision was not state action.

POINT III

KPMG's Decision To Terminate Fee Payments For Indicted Defendants Did Not Violate The Sixth Amendment

The Government explained in its principal brief that the Sixth Amendment does not provide a criminal defendant with the right to receive voluntary third-party payments for legal fees. (Gov't Br. 63-66). The defendants recast their arguments in their responsive briefs, but no amount of wordsmithing can avoid the force of the Supreme Court reasoning that squarely rejects their attempted expansion of the Sixth Amendment's scope.

A. Standard Of Review

The defendants cite two older cases for the proposition that a district court's dismissal of an indictment is reviewed under an abuse of discretion standard. (Stein Br. 31). In more recent cases, this Court has stated that "'[a] motion to dismiss an indictment alleging outrageous government conduct is a question of law directed to the trial judge and review of rulings thereon is *de novo*.'" *United States* v. *Williams*, 372 F.3d 96, 112 (2d Cir. 2004) (quoting *United States* v. *Cuervelo*, 949 F.2d 559, 567 (2d Cir. 1991)). This Court should review the District Court's dismissal *de novo*, given that the decision to dismiss an

indictment is "predominantly legal." *United States* v. *Thorn*, 446 F.3d 378, 387 (2d Cir. 2006). But in any event, this Court reviews "constitutional claims *de novo*," *United States* v. *Desena*, 287 F.3d 170, 176 (2d Cir. 2002), and so dismissal based on an erroneous constitutional ruling would constitute an abuse of discretion.

B. Discussion

The defendants characterize the Sixth Amendment right here as being "a defendant's right to use the resources lawfully available to him to secure representation by counsel, free of government interference," and claim that such a right "is at the historical core of the Sixth Amendment." (Stein Br. 67). But the Supreme Court has never endorsed such an expansive interpretation of the Sixth Amendment's protections, and the cases on which the defendants rely do not support their conclusion.

1. *Caplin & Drysdale* Controls This Issue

In *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1989), the petitioners argued—similar to the defendants here—that the pretrial restraint of a defendant's potentially forfeitable assets "infringes on criminal defendants' Sixth Amendment right to counsel of choice, and upsets the 'balance of power' between the Government and the accused in a manner contrary to the Due Process Clause." *Id.* at 624. The Supreme Court, however, disagreed.

The Court noted that nothing in the forfeiture statutes "prevents a defendant from hiring the attorney of his choice, or disqualifies any attorney from serving as a defendant's counsel." *Id.* at 625. So too here, nothing in

the Thompson Memorandum or the USAO's statements reflects any objection or preference regarding any defendant's counsel of choice. Both the petitioners in *Caplin & Drysdale* and the defendants here claimed that the Sixth Amendment was violated by Government conduct affecting the availability of assets that they would have otherwise used to pay for attorneys. And the Court's basis for rejecting that argument in *Caplin & Drysdale* applies with equal force to the defendants' claims regarding the Thompson Memorandum.

The Court recognized that "[t]he forfeiture statute does not prevent a defendant who has nonforfeitable assets from retaining any attorney of his choosing. Nor is it necessarily the case that a defendant who possesses nothing but assets the Government seeks to have forfeited will be prevented from retaining counsel of choice." *Id.* As a result, "[t]he burden placed on defendants by the forfeiture law is therefore a limited one." *Id.* Any burden on the defendants' qualified right to counsel of choice attributable to the Thompson Memorandum is similarly limited.[*]

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[*] Indeed, if the Thompson Memorandum imposed as substantial a burden as the defendants claim, then scores of defendants across the country would have been denied corporate funds to pay their attorneys over the years. There is no evidence, however, of any such effect, and the only evidence in this record relating to entities other than KPMG reflects a corporate decision to pay its employees' attorneys fees (with no adverse consequences whatsoever). (Smith A. 454).

But, the Court held, even in those cases (as with defendants Gremminger, Hasting, Watson, and Ritchie) "where a defendant will be unable to retain the attorney of his choice, when that defendant would have been able to hire that lawyer if he had access to forfeitable assets," the argument that the Sixth Amendment limits the operation of the forfeiture statute was "untenable." *Id.* at 625-26. It was in this context that the Court declared, in no uncertain terms:

> Whatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond the individual's right to spend his own money to obtain the advice and assistance of counsel. *A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice.*

Id. at 626 (citation omitted) (emphasis added).[*]

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[*] The defendants try to sidestep the plain language of the Court's decision by noting that the funds at issue in that case were potentially subject to forfeiture, and therefore already belonged to the Government under the "relation back" doctrine. (*See* Stein Br. 72-74). But the reasoning quoted above did not depend on the status of the funds—which in this case belonged to KPMG and not any individual defendant in any event—and so applies equally to the situation presented here.

The Court likewise rejected the argument, made by the defendants here, that the complexity of the criminal case affects the Sixth Amendment analysis. "We also reject the contention that a type of *per se* ineffective assistance of counsel results—due to the particular complexity of RICO or drug-enterprise cases—when a defendant is not permitted to use assets in his possession to retain counsel of choice, and instead must rely on appointed counsel." *Id.* at 630 n.7. The Court noted that such a rule would prohibit the use of appointed counsel in complex cases. "[W]e cannot say that the Sixth Amendment's guarantee of effective assistance of counsel is a guarantee of privately retained counsel in every complex case, irrespective of a defendant's ability to pay." *Id.*

2. The Defendants' Restatement Of Their Argument And Recitation Of Unrelated Sixth Amendment Authorities Do Not Change The Result

The defendants attempt to circumvent the effect of *Caplin & Drysdale*'s reasoning by recasting the terms of their claim: "Appellees claim no affirmative constitutional entitlement to spend KPMG's money in their defense, but a negative right to be free of unjustified interference with their exercise of the right to counsel." (Stein Br. 71). But rearranging the words in the argument gives it no more merit. In any event, this "negative right" is not what the defendants are claiming. If this were accurate, even failed efforts by the Government to prevent a third party from paying for a defendant's attorneys would violate the Sixth Amendment, because the "interference" would be the basis for the violation. The defendants' true claim is a right to

actually receive funds from KPMG, as they admit elsewhere. (*See* Stein Br. 100 (claimed "harm here was not the application of pressure alone," but rather "that the government's coercive tactics succeeded")).

Notwithstanding *Caplin & Drysdale*—unarguably the Supreme Court case most closely analogous to the situation presented here—the defendants attempt to construct support for their interpretation by reciting numerous unrelated Sixth Amendment precedents and then simply declaring that they lead to the result they seek.

First, the defendants announce broadly that the Sixth Amendment "ensures fairness within the adversary system." (Stein Br. 67). But the "fairness" reflected in the cases they cite, such as *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), concerns a defendant's right to be represented by counsel at all, an issue not implicated here. Second, a defendant's right to "control the presentation of his defense" (Stein Br. 68), includes the qualified right to counsel of choice, and, as recognized in *Lainfiesta* v. *Artuz*, 253 F.3d 151 (2d Cir. 2001), the right to "choose the counsel who presents it," and the protection against arbitrary interferences by the court "with the ability of counsel to make independent decisions about how to conduct the defense." *Id.* at 154. But again, as recognized in *Caplin & Drysdale*, any effect on the defendants' resources attributable to the Government did not preclude them from hiring any attorney willing to represent them, and certainly did not purport to control the manner in which the defense was presented. Third, it is of course true that the Sixth Amendment "guarantees the accused, at least after the initiation of formal charges, the right to rely

on counsel as a 'medium' between him and the State," and that "this guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right." *Maine* v. *Moulton*, 474 U.S. 159, 176 (1985), but that principle does not support the defendants' claims here. The Sixth Amendment protection against post-arraignment uncounseled questioning of a defendant by a state agent (which was at issue in *Moulton*) has little, if anything, to do with the defendants' claimed right to third-party resources to finance their defense. Finally, the Government has not attempted to "interfere with the tactical decisions" made by the defendants and their attorneys in this case, either before or after indictment. (Stein Br. 69).

After essentially reciting the entire catalogue of Sixth Amendment protections—none of which say anything about the use of third-party funds to pay attorneys—the defendants then simply declare that the Sixth Amendment "bars government interference with a defendant's use of resources that would otherwise be lawfully available to him to obtain counsel." (Stein Br. 70). But the absence of any authority supporting such a broad new interpretation of the Sixth Amendment, combined with the unequivocal rejection of substantially similar arguments in *Caplin & Drysdale*, make such a claim, as the Supreme Court has said, untenable.

The Supreme Court has rejected such arguments for good reason. If the defendants' claim were correct, then any Government influence on a third party's decision to cease making voluntary contributions for the defense of another would violate the Sixth Amendment. A real-world

example demonstrates the point. Suppose a drug kingpin has been arrested, and, facing substantial prison time, wishes to cooperate with the Government. As part of the process, the Government asks whether the kingpin is financing the criminal defenses of those members of his organization who get arrested. Such inquiries are commonplace in such cases; among other matters, the Government has an obligation to assess potential conflicts of interest.

Suppose further that this particular cartel leader has indeed been financing the defense of his underlings who get arrested running his operation, and that he has sufficient untainted assets (having diversified his business interests over the years) to continue to do so if he wishes. But even though the Government has merely inquired about his payment of others' attorneys fees, not insisted that it cease, the kingpin believes that the Government will be more lenient if he severs all ties to his organization, and so he terminates his financial support for his narcotics operatives. After he does so, those defendants—mules, packagers, street dealers—suddenly find themselves without sufficient funds to retain private counsel, and so must rely on court-appointed attorneys. In that situation, those individuals would have no Sixth Amendment claim against the Government. Those defendants never had any right to receive those "lawfully available" funds in the first place (drug cartels tending not to have by-laws with mandatory indemnification provisions), so the kingpin's decision—although undoubtedly influenced, even encouraged, by the Government's prosecution of him and his desire to appear as cooperative as possible—cannot be a Sixth Amendment violation.

The defendants mischaracterize the Government's statement in its opening brief that neither *Caplin & Drysdale* nor *United States* v. *Monsanto*, 491 U.S. 600 (1989), hold that "the Sixth Amendment prevents interference with a third party's purely voluntary decision to pay the legal fees of a criminal defendant." (Gov't Br. 64). As explained above, this statement is an entirely accurate recitation of the Sixth Amendment rulings in those cases. But the defendants twist it to suggest that the Government was arguing that it may routinely interfere with the assets available to criminal defendants. This is nonsense. The Due Process Clause protects all persons from arbitrary adverse governmental action, and thus would prohibit the Government from capriciously singling out a particular defendant for harassment regarding the assets being used for his defense. More fundamentally, the qualified right to counsel of choice is protected by the Sixth Amendment (though not violated by the conduct at issue in *Caplin & Drysdale*, *Monsanto*, or here), and the Government does not support or sanction any deliberate unjustified interference with constitutional rights. The argument illustrates only that, even when viewed in the light most favorable to the defendants, the events as found by the District Court did not violate any recognized right protected by the Sixth Amendment.

Another example proves the point. The defendants claim that, under the Government's interpretation, "it would be free to threaten a defendant's parents to prevent them from retaining counsel for their child." (Stein Br. 73). Of course not. But a more realistic example demonstrates why the Supreme Court has refused to adopt the defendants' interpretation. Consider a defendant arrested

for a property crime. All concerned agree that the defendant has a drug problem and would benefit from treatment. Suppose that the defendant's parents initially decide to pay for his attorney, but then meet with the prosecutors, who explain the drug treatment and counseling options available should the defendant agree to accept responsibility. The parents decide that it would be in their son's best interests to plead guilty, and so stop paying for his attorney to contest the case. But suppose the defendant wishes to fight the charges, and now finds himself without funds to pay for his counsel of choice. Did the prosecutors violate the defendant's Sixth Amendment rights by talking to the parents? Obviously not, even though they clearly "interfered" with the defendant's access to his parents' money.

The defendants argue in passing that, because KPMG is a partnership, KPMG's fee advancements were not actually third-party funds, because they "would have come from funds belonging to the partnership as a whole, in which every member of the firm had a stake." (Stein Br. 71). If this were accurate, each partner would have a claim that KPMG wrongfully withheld "their" money, but no defendant made any such claim in their complaint against KPMG in the summary proceeding. (*See* Compl., 06 Civ. 5007 (LAK), July 10, 2006). In any event, the Delaware Revised Uniform Limited Partnership Act makes clear that while a "partnership interest is personal property," an individual partner "has no interest in specific limited partnership property." 6 Del. C. § 17-701.

Finally, the defendants argue that the Government's actions in promulgating the Thompson Memorandum and in reinforcing its provisions during the February 25

Meeting were unjustified. (Stein Br. 73-77). As explained above, the defendants' attempted construction of the Sixth Amendment to require such justification fails *ab initio*, so no such inquiry is necessary.[*] But the defendants' argument fails on its own terms as well. The defendants concede that "the government may permissibly consider a corporation's payment of legal fees for its employees as a factor favoring indictment when other evidence makes clear that the corporation is attempting to obstruct an investigation by buying its employees' silence." (Stein Br. 76). This concession provides whatever justification may be necessary to uphold the Thompson Memorandum's reference to fee payments. But the defendants charge that this interest was absent here, because the Government never concluded that KPMG sought to obstruct the investigation. Yet that conclusion came, as it had to, at or near the *end* of the investigation, not the beginning. The Government has no way of evaluating the *bona fides* of a corporation's purported cooperation at the outset of an investigation; the sincerity of any such efforts only becomes clear at the end, when the charging decisions are

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[*] The District Court likewise stated that the Government was required to demonstrate that its conduct was not "'wrongfully motivated or without adequate justification.'" *Stein I*, 435 F. Supp. 2d at 367. In this regard, the District Court quoted an older Third Circuit case, *Via* v. *Cliff*, 470 F.2d 271, 275 (3d Cir. 1972), which imposed this requirement with neither citation to authority nor discussion of the issue. As far as the Government is aware, no court in this circuit has imposed such a requirement in Sixth Amendment cases.

made. In February 2004, the criminal investigation into KPMG was less than one month old. The Government could not have known at that time whether KPMG would sincerely cooperate with the inquiry. That the Government ultimately found no reason to conclude that KPMG obstructed the investigation does not make the presence of that factor in the Thompson Memorandum, or the USAO's reference to it, inappropriate.

3. The Government Did Not Violate The Right To Counsel Of Choice

Defendants Gremminger, Hasting, Watson, and Ritchie contend that they have suffered a violation of their qualified right to counsel of choice, because each of them changed attorneys when KPMG decided not to pay their attorneys fees after indictment. But these claims are derivative of the Sixth Amendment "right to resources" claim made by all the defendants, and fail for the same reasons.

None of the defendants raising a "right to counsel of choice" claim argue that anything other than KPMG's decision regarding fee payments resulted in their decision to change attorneys. The Government did not seek to disqualify any of their chosen attorneys, nor did the District Court refuse to permit any attorney to appear on their behalf. In *Caplin & Drysdale*, the Court specifically considered the situation in which a criminal defendant would be "unable to retain the attorney of his choice, when that defendant would have been able to hire that lawyer if he had access to forfeitable assets." 491 U.S. at 625. The Court ruled that lacking access to another person's assets to use to retain chosen counsel did not improperly infringe

on the qualified right to counsel of choice. As a result, the Sixth Amendment arguments related to "counsel of choice" fail for the same reasons as do the broader claims regarding access to resources.

Defendant Hasting argues that his situation is different, because he has exhausted his resources, and is forced to continue with the services of an attorney with whom he has an ongoing dispute over nonpayment of fees. (*See* Hasting Br. 3-5). The District Court, relying on *United States* v. *Parker*, 439 F.3d 81, 104-05 (2d Cir. 2006), denied Hasting's attorney's motion for leave to withdraw from the case. (*See* Stein A. 212, Dkt. 1047). Because the Sixth Amendment does not "guarantee[] a 'meaningful relationship' between an accused and his counsel," *Morris* v. *Slappy*, 461 U.S. 1, 14 (1983), defendant Hasting's situation with his attorney—who has continued to represent him in accordance with the District Court's order—does not alter the analysis here. Although defendant Hasting (like many criminal defendants) might make different choices in representation if he had unlimited personal resources, his inability to use KPMG's funds to pay for a different lawyer does not violate his qualified right to counsel of choice.

POINT IV

The Government Did Not Violate The Defendants' Due Process Rights

The defendants, perhaps recognizing that the District Court's primary substantive due process analysis was precluded by *Graham* v. *Connor*, 490 U.S. 386 (1989), now argue that the Government violated their procedural

due process rights. (Stein Br. 82-89). But this recharacterization fails because, at base, the defendants' due process claim is that the Government could not, under any circumstances, deprive them of KPMG's funds, not that the Government could do so if it followed certain procedures. Such a claim implicates substantive, not procedural, protections. And regardless of whether denominated as substantive or procedural, the defendants' claims stem from the Sixth Amendment, which, under *Graham*, is the exclusive vehicle for evaluating their arguments. In any event, in criminal cases the standard for evaluating procedural due process protections is virtually identical to that for substantive due process claims, and so the defendants' revised claim fails for the same reasons.

A procedural due process claim asserts that, although the Government may under certain circumstances deprive the claimant of a life, liberty, or property interest, in the case at hand it "cannot do so on the basis of the procedures it provides." *Reno* v. *Flores*, 507 U.S. 292, 306 (1993). Substantive due process, by contrast, "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Id.* at 302 (emphasis in original); *see also DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195 (1989) ("The claim is one invoking the substantive rather than the procedural component of the Due Process Clause; petitioners do not claim that the State denied [a child] protection without according him appropriate procedural safeguards, but that it was categorically obligated to protect him in these circumstances.") (citation omitted).

A. The Defendants' Claim Arises Under The Sixth Amendment And Is Barred By *Graham*

The defendants argue that the Government violated the procedural protections of the Due Process Clause through "efforts to deprive appellees of their liberty without a fair trial." (Stein Br. 82). But this is far too general a characterization, akin to a *Bivens* plaintiff claiming a "clearly established" right to be "free from unreasonable searches and seizures." *See Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (noting that "right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense") (quotation omitted). Virtually every trial-related protection—including those specifically protected by the Sixth Amendment—plays a part in the overall effort to ensure criminal defendants a fair trial. Under the defendants' construction, every aspect of criminal law would be converted into a procedural due process right. That clearly is not the case. As the Supreme Court has explained, "[t]he Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause." *Strickland* v. *Washington*, 466 U.S. 668, 684-85 (1984).

The defendants claim that they have been deprived of resources for their defense because of the Government's influence on KPMG's decision not to pay the defendants' post-indictment legal fees. (Stein Br. 84). That claim, if protected anywhere within the Constitution, stems from

the Sixth Amendment. In considering this precise claim, another court examined its potential sources:

> Because the right to expend one's resources toward one's defense is not well developed in the law, it is unclear whether the right is (i) a Sixth Amendment right independent of the right to counsel of choice and to effective counsel; (ii) a component of the right to counsel of choice, (iii) a component of the right to effective assistance, or (iv) some sort of prophylactic rule designed to protect other Sixth Amendment rights. The best interpretation seems to be that the right to expend one's resources in one's own defense is an independent right, the scope of which delimits the right to counsel of choice.

United States v. *Rosen*, 487 F. Supp. 2d 721, 727 n.8 (E.D. Va. 2007) (citing *Caplin & Drysdale*, 491 U.S. at 626). Under the explicit directive of *Graham*, because the claim arises under the Sixth Amendment, that amendment, and not the Due Process Clause, must be the basis for analyzing it. Indeed, this Court, sitting *en banc*, has rejected analogous efforts to use the Due Process Clause to expand the constitutional protections provided by the Sixth Amendment. "While violations of an accused's right to counsel are encompassed within the concept of due process, the due process clauses neither expand nor contract the constitutional protection provided by the Sixth

Amendment right to counsel." *In re Grand Jury Subpoena*, 781 F.2d 238, 246 (2d Cir. 1986) (en banc).[*]

B. The Defendants' Claim Does Not Implicate A Fundamental Right

Even if the defendants' claim were properly considered as a procedural due process claim, it fails on the merits for the same reasons as it does when labeled as a substantive due process claim, because in criminal cases both types of claims must implicate "fundamental rights" before garnering constitutional protection.

As the Government detailed in its principal brief, the substantive component of the Due Process Clause encompasses only "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington* v. *Glucksberg*, 521 U.S. 702, 720-21 (1997) (quotations and citations omitted). (Gov't Br. 70-76). The test is identical when considering

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[*] The DeLap Brief cites this same case in support of the defendants' Sixth Amendment argument, but fails to advise the Court that they are relying on the dissenting opinion. (*See* DeLap Br. 30 (quoting Cardamone, J., dissenting)). As a result, the defendants' central Sixth Amendment claim—that "the government may not 'through its actions unreasonably and unnecessarily interfere' with" a defendant's access to resources to hire an attorney (*id.*)—relies on reasoning that was rejected by this Court, sitting *en banc*.

due process challenges to a procedure or rule: courts must "determine if they offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Hines* v. *Miller*, 318 F.3d 157, 161-62 (2d Cir. 2003) (quotation and alteration omitted); *accord Cooper* v. *Oklahoma*, 517 U.S. 348, 355 (1996). Indeed, this Court has recognized that "the Supreme Court has applied the same test when reviewing both substantive and procedural due process challenges to criminal laws." *United States* v. *Quinones*, 313 F.3d 49, 61 n.9 (2d Cir. 2002) (citing *Medina* v. *California*, 505 U.S. 437 (1992), and *Washington* v. *Glucksberg*, 521 U.S. 702 (1997)).

As with substantive due process, the Supreme Court has made clear that, in criminal cases, courts must scrutinize procedural due process claims with particular care. "In the field of criminal law, we have defined the category of infractions that violate 'fundamental fairness' very narrowly based on the recognition that, beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Medina* v. *California*, 505 U.S. at 443 (quotation omitted). Further, given the protections already explicitly afforded by the Sixth Amendment, judges must be especially cautious about relying on more nebulous "due process" concepts. "The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Id.*

As a result, the Supreme Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly." *Dowling* v. *United States*, 493 U.S. 342, 352 (1990). It further has admonished the lower courts that

> Judges are not free, in defining "due process," to impose on law enforcement officials their personal and private notions of fairness and to disregard the limits that bind judges in their judicial function. They are to determine only whether the actions complained of violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency.

Id. at 353 (citations and alterations omitted).

The defendants improperly attempt to define the right at issue as being the "right to fairness in criminal proceedings." (Stein Br. 91). But "fairness" is not a specific right in and of itself, but rather the result achieved by a collection of various rights associated with criminal prosecutions, as the defendants themselves recognize. (*See* Stein Br. 90 (discussing various "cases establishing the content of the due process right to a fair trial")). To declare the abstract "right to fairness" as being a fundamental right would run headlong into the trap identified in *Glucksberg* and *Dowling*, because then the various components of the "right" would differ depending on the personal views of the judges evaluating the claims. In this respect, at least, the District Court was correct to narrow the issue to "whether a criminal defendant has a right to obtain and use

in order to prepare a defense resources lawfully available to him or her, free of knowing or reckless government interference." *Stein I*, 435 F. Supp. 2d at 361.

The defendants' claim of a right to receive voluntary third-party payment of their legal fees does not rise to the level of a fundamental right. Indeed, the fact that the District Court in this case is the one and only court to have recognized such a right as being fundamental "is reason enough to doubt that 'substantive due process' sustains it; the alleged right certainly cannot be considered so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Reno* v. *Flores*, 507 U.S. at 303 (quotation omitted). "Our primary guide in determining whether the principle in question is fundamental is, of course, historical practice." *United States* v. *Quinones*, 313 F.3d at 62 (quotation omitted); *accord Medina*, 505 U.S. at 446 ("Historical practice is probative of whether a procedural rule can be characterized as fundamental."). No historical antecedents support declaring a "fundamental" right to avoid interference with a third party's voluntary decision to contribute to a defendant's defense. The right to counsel is enshrined in the Sixth Amendment itself, and the right to have that counsel satisfy minimum standards of effectiveness ensures that the underlying right fulfills its purpose. But as the nature of the claimed right moves farther away from the core protections of the Sixth Amendment, any argument that it nevertheless remains "fundamental" loses its force.

The qualified right to counsel of choice, although protected by the Sixth Amendment, is by definition not absolute, and may be overriden by such interests as

efficient docket management and the standards of practice within the jurisdiction. *See Wheat* v. *United States*, 486 U.S. 153, 159 (1988); *see also United States* v. *Gonzalez-Lopez*, 548 U.S. 140, __, 126 S. Ct. 2557, 2565-66 (2006) (reaffirming and discussing prior decisions placing limits on the right to counsel of choice). Any right to resources associated with presenting a defense is yet another step removed from the Sixth Amendment's core guarantees. With no historical support, the defendants' efforts to have the heretofore unrecognized "right to obtain and use in order to prepare a defense resources lawfully available to him or her, free of knowing or reckless government interference" elevated to a status parallel with the right to marry and the right to have children simply cannot be sustained.

In sum, the defendant have merely refashioned their argument in hopes of evading the obvious legal barriers to its success. But, as the Supreme Court recognized in a similar situation, "[t]his is just the 'substantive due process' argument recast in 'procedural due process' terms, and we reject it for the same reasons." *Flores*, 507 U.S. at 308.

C. The Government's Conduct Did Not "Shock The Conscience"

The Government's principal brief detailed the errors in the District Court's conclusion that dismissal was warranted because the Government's conduct "shocked the conscience." (Gov't Br. 76-106). The defendants fail to suggest how the investigation and prosecution of this case parallel the forced removal of a defendant's stomach contents, or the *incommunicado* interrogation of a suspect

for days on end, so as to justify dismissal on this basis. Indeed, the defendants have abandoned, on appeal, their effort before the District Court to compare this case to three other cases in which outrageous government conduct was found.*

Defendant Eischeid raises additional claims that he contends support the District Court's dismissal, but these claims have already been rejected by the District Court as unfounded, are premature, and lack merit. At base, defendant Eischeid complains that his preferred defense theory appears much less credible now that KPMG has admitted its responsibility for devising, marketing, and implementing the fraudulent tax shelters charged in the Indictment. His brief catalogues the formation of the shelters, his own defense of those shelters as a witness before the United States Senate, and KPMG's execution of the DPA. (Eischeid Br. 4-10). But nowhere does he explain how KPMG's entry into the DPA has visited a constitutional violation on him. He then argues that the Statement of Facts accompanying the DPA (*see* Stein A. 383-92) was forced on KPMG "upon pain of corporate death." (Eischeid Br. 2). But he fails to explain how the Statement of Facts prejudices him. The Statement of Facts is essen-

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* *United States* v. *Marshank*, 777 F. Supp. 1507 (N.D. Cal. 1991); *United States* v. *Sabri*, 973 F. Supp. 134 (W.D.N.Y. 1996); *United States* v. *Stringer*, 408 F. Supp. 2d 1083 (D. Or. 2006), *appeal pending*, No. 06-30100 (9th Cir.). Of the twelve defense and *amicus* briefs, only one cites even one of these cases (*Marshank*), and for a different reason. (*See* NACDL *Amicus* Br. 26-27).

tially the guilty plea allocution of a coconspirator; as such, the Government has never suggested that it would attempt to introduce it into evidence at trial (unless a defendant first attempted to offer an excerpt and other portions were necessary for completeness). The precise wording of the Statement of Facts was, of course, the subject of extensive discussions between the Government and KPMG, but the final statements were KPMG's, as demonstrated by KPMG's statement under oath admitting the truth of the Statement of Facts. (*See* Gov't *Smith* Br. 31 n.*). There is certainly nothing improper about KPMG admitting its criminal conduct, or with the Government demanding such an acceptance of responsibility in the context of exercising its discretion to defer, rather than pursue, a prosecution.

Defendant Eischeid also contends that the DPA has obstructed his access to crucial KPMG witnesses. (Eischeid Br. 15). But the DPA required only that KPMG *as an entity* not contradict the Statement of Facts, and that if an individual presently connected with KPMG were to do so, and that person occupied a sufficiently high management position within KPMG such that the statement could be imputed to the partnership as a whole, KPMG would be obligated to repudiate the statement. (Stein A. 332-33). This provision (like the entire DPA) binds only KPMG, not its partners or employees, and does not bar anyone from saying anything they wish. It most certainly does not place any burden on defendant Eischeid's "right to present witnesses in his favor." (Eischeid Br. 15). Regardless, any such claim will only ripen upon trial, and should be presented as part of an appeal following conviction.

The District Court properly rejected this argument when made by defendant Eischeid below. *See United States* v. *Stein*, S1 05 Cr. 888 (LAK), 2006 WL 1063295 (S.D.N.Y. Apr. 5, 2006). The District Court recognized the Government's "legitimate interest in seeing to it that KPMG not gain the benefit of deferred prosecution, only to undermine its formal acceptance of guilt by making statements inconsistent with it." *Id.* at *2. Further, "[t]he DPA does not purport to control the actions of individuals," and "there is no basis to suppose that the DPA provisions in question will be used to retaliate against KPMG should any of its employees cooperate with the defense in any appropriate way." *Id.* The DPA, like the rest of the Government's actions in investigating and prosecuting this case, cannot support the dismissal of the Indictment for outrageous government conduct.

POINT V

The District Court's Dismissal Of The Indictment Cannot Be Sustained Under The Federal Courts' Supervisory Powers

Several defendants and one *amicus* suggest that this Court need not resolve the constitutional issues presented by the District Court's decision, because it may be affirmed as an exercise of the federal courts' supervisory power. (DeLap Br. 43-48; Washington Legal Foundation ("WLF") *Amicus* Br. 5-13). But in the context of policing the investigative activities of the executive branch, the supervisory power of a district court operates only to redress violations of the defendants' constitutional rights. In other words, because the Government did not violate the defendants' rights, the defendants cannot fall back on

the supervisory power of the federal courts to justify the Indictment's dismissal.

"Guided by considerations of justice, and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress. The purposes underlying use of the supervisory powers are threefold: to implement a remedy for violation of recognized rights, to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury, and finally, as a remedy designed to deter illegal conduct." *United States* v. *Hasting*, 461 U.S. 499, 505 (1983) (citations and quotation omitted). However, "the federal judiciary's supervisory powers over prosecutorial activities that take place outside the courthouse is extremely limited, if it exists at all." *United States* v. *Lau Tung Lam*, 714 F.2d 209, 210 (2d Cir. 1983). The supervisory power "does not permit courts to fashion their own 'sub-constitutional' limitations on the conduct of law enforcement agents," and "has not been used as a general corrective authority over the conduct of criminal investigations." *United States* v. *Myers*, 692 F.2d 823, 847 (2d Cir. 1982). As the Supreme Court has emphasized, supervisory power "deal[s] strictly with the courts' power to control their *own* procedures." *United States* v. *Williams*, 504 U.S. 36, 45 (1992) (emphasis in original). Although supervisory power "may be used as a means of establishing standards of prosecutorial conduct before the courts themselves, " it cannot be used "as a means of *prescribing* those standards of prosecutorial conduct in the first instance." *Id.* at 47 (emphasis in original); *see also United States* v. *Simpson*, 927 F.2d 1088, 1091 (9th Cir. 1991) ("The supervisory

power comprehends authority for the courts to supervise their own affairs, not the affairs of the other branches; rarely, if ever, will judicial integrity be threatened by conduct outside the courtroom that does not violate a federal statute, the Constitution or a procedural rule.").

Consistent with these principles, this Court has exercised its supervisory power to, for example: prohibit district courts from conducting guilty pleas or sentencings in the private robing room, *United States* v. *Alcantara*, 396 F.3d 189, 203 (2d Cir. 2005); decline to consider a Government cross-appeal of a sentence where, if the appeal were granted, the defendant would be exposed to a higher sentence on remand than he would have been had he never challenged the Presentence Investigation Report, *United States* v. *Johnson*, 221 F.3d 83, 95-97 (2d Cir. 2000); recognize a district court's discretion to suppress defendant statements obtained in violation of ethics rules regarding contacts with represented persons, *United States* v. *Hammad*, 846 F.2d 854 (2d Cir. 1988); and bar district courts from compelling individuals to sign consent forms authorizing the release of information from overseas banks, *In re N.D.N.Y. Grand Jury Subpoena*, 811 F.2d 114, 118 (2d Cir. 1987). By contrast, the Court has refused to dismiss an indictment for delay absent a violation of the Speedy Trial Act, *United States* v. *Simmons*, 812 F.2d 818, 820-21 (2d Cir. 1987); and, of particular significance here, refused to do so based on events occurring during the Government's investigation that did not otherwise violate the defendant's rights, *United States* v. *Lau Tung Lam*, 714 F.2d at 210; *United States* v. *Myers*, 692 F.2d at 847. In such cases, defendants "are entitled to no more than a

testing" of the investigative methods "against constitutional standards." *Myers*, 692 F.2d at 847.

Even in cases affirming the use of supervisory power, this Court has taken pains to emphasize that any such exercise is not an effort to regulate the authority of the Government to conduct investigations. *See, e.g.*, *In re N.D.N.Y. Grand Jury Subpoena*, 811 F.2d at 118 ("In so doing, despite our distaste for its tactics here, we do not attempt to control the executive branch's behavior, but only that of the district courts when requested to intervene to enforce this disingenuous practice."); *United States* v. *Ming He*, 94 F.3d 782, 792 (2d Cir. 1996) ("This particular exercise of supervisory power is not an encroachment on the conduct of executive branch officials, that is, we are not attempting to govern the conduct of federal agents whose task is to investigate and prevent criminal activity.").

The Supreme Court has warned that the supervisory power does not permit the "substitution of individual judgment for the controlling decisions of this Court. Were we to accept this use of the supervisory power, we would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." *United States* v. *Payner*, 447 U.S. 727, 737 (1980) (footnote omitted). In *Payner*, the Court refused to sanction the use of supervisory power to suppress evidence seized from a third party, noting that such a seizure did not violate the defendant's Fourth Amendment rights. *See id.* at 735-37. The Court also held that, even if the third-party seizure could be interpreted as "outrageous government conduct" under the Due Process Clause, supervisory

power could not be invoked unless "the Government activity in question violates some protected right of the *defendant*." *Id.* at 737 n.9 (quotation omitted) (emphasis in original).

In light of *Payner*, *Hasting*, and the relevant Circuit precedents discussed above, the District Court's supervisory power, whatever its scope, cannot support its dismissal of the Indictment because the Government did not violate the defendants' constitutional rights during the investigation of this case, either through the promulgation of the Thompson Memorandum or through the Government's interactions with KPMG at the February 25 Meeting and thereafter. Absent a constitutional violation, this Court should not endorse an expansion of the supervisory powers doctrine to dismiss an indictment based on the out-of-court conduct of the executive branch.

The defendants and *amicus* place great weight on *Ming He* because of language in that opinion suggesting that the supervisory power extends to regulating the conduct of prosecutors outside the courtroom. In that case, this Court ruled that a district court could not consider at sentencing adverse information obtained by the Government during uncounseled proffer sessions, absent an explicit waiver of defense counsel's presence. Although the Court referenced its "general supervisory authority over members of the bar of this Court," 94 F.3d at 792, it "direct[ed] the district courts not to further this practice relied on by a federal prosecutor," *id.* at 793. The ruling that "cooperating witnesses are entitled to have counsel present at debriefings, unless they explicitly waive such assistance," *id.*, hinged on uncounseled information having been presented

to the court at sentencing. In other words, had the same uncounseled sessions occurred without adverse information obtained during those sessions being presented to the court, no issue would have arisen.

Deterrence of future Government conduct likewise cannot support the use of supervisory power here. In *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988), the Court noted that "deterrence is an inappropriate basis for reversal where means more narrowly tailored to deter objectionable prosecutorial conduct are available." *Id.* at 255 (quotation omitted). Here, to the extent that deterrence was even appropriate, the District Court had already achieved it without dismissing the Indictment. Despite the United States Attorney's request, the District Court declined to remove the names of the individual prosecutors from its opinions, thereby publicly associating them with what the District Court considered to be inappropriate conduct. *See United States* v. *Hasting*, 461 U.S. at 506 n.5 (noting that, instead of reversing conviction, court "could have publicly chastised the prosecutor by identifying him in its opinion"). Such judicial condemnation is a strong sanction, and its significance should not be underestimated. "A reprimand in a published opinion that names the prosecutor is not without deterrent effect." *United States* v. *Modica*, 663 F.2d 1173, 1185 (2d Cir. 1981). Nor is it common; the *Modica* panel recognized that "appellate courts have generally been reluctant to name the individual prosecutors," and found only two such instances, both indirect, in the preceding ten years. *See id.* at 1185 n.7.

As the Government has explained, the more narrowly tailored remedy of adjournment, combined with the

Government's own efforts to facilitate the defendants' preparation for trial, more properly addressed any violations found by the District Court. Both the executive and legislative branches have responded to the issues raised by the District Court in *Stein I*; the issue was discussed at congressional hearings, and the Department of Justice revised its guidance to state more explicitly that the advancement of attorneys fees can be considered a negative factor only when associated with an effort to obstruct the Government's investigation. Dismissing the Indictment was neither necessary nor appropriate given these additional considerations. "By penalizing executive conduct that violates neither the Constitution nor a federal statute, the court invaded the domain of the legislature, whose role it is to establish limits on such conduct by law; and it invaded the province of the executive, whose function it is, within legal limits, to decide how to enforce the law." *United States* v. *Simpson*, 927 F.2d at 1090.

Under the appropriate interpretation of the supervisory power, the defendants "are entitled to no more than a testing" of the investigative methods "against constitutional standards." *Myers*, 692 F.2d at 847. That testing reveals no constitutional violations, so the District Court's dismissal cannot be sustained on this basis.

CONCLUSION

The order dismissing the Indictment should be reversed, and the Indictment should be reinstated as to the defendants-appellees.

Dated: New York, New York
February 8, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief does not comply with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word-processing system used to prepare this brief, there are 14,503 words in this brief. A motion for leave to file an overlength brief is being submitted herewith.

MICHAEL J. GARCIA,
United States Attorney for the Southern District of New York

By: KARL METZNER,
Assistant United States Attorney

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Stein

Docket Number: 07-3042-cr

I, Louis Bracco, hereby certify that the Reply Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 2/8/2008) and found to be VIRUS FREE.

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Louis Bracco
Record Press, Inc.

Dated: February 8, 2008