07-3042-cr

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

—against—

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

BRIEF FOR DEFENDANT-APPELLEE GREGG RITCHIE

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INTRODUCTION

The district court dismissed the indictment against appellee Gregg Ritchie because the United States Attorney's Office ("USAO") violated three of Ritchie's fundamental constitutional rights: (1) the Sixth Amendment right to be represented by counsel of his choice, (2) the Sixth Amendment right to present a defense free from government interference, and (3) the Fifth Amendment right to a fair trial. Yet the government's opening brief fails to even address the district court's first ground for dismissal. This brief focuses on that issue: Because the USAO irredeemably deprived Ritchie of his right to counsel of his choice, dismissal was mandated and the district court's order must be affirmed.[1]

As an initial matter, the government's failure to directly confront the choice

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[1] With respect to the second and third grounds for dismissal, the briefs of appellees Stein, Lanning, Smith, Bickham and Rosenthal; and DeLap, Gremminger, Warley, Watson and Weisner (the "Stein *et al.* Brief" and the "DeLap *et al*. Brief") conclusively demonstrate that the USAO violated each of the appellees' constitutional rights to a fair trial and to present a defense free from government interference. Pursuant to Federal Rule of Appellate Procedure 28(i), Ritchie joins and incorporates each of those briefs.

Likewise, appellees Carl Hastings and Steven Gremminger — who suffered and were found by the district court to have suffered the same constitutional violations as Ritchie, including specifically deprivation of the right to counsel of choice, *see United States v. Stein*, 495 F. Supp. 2d 390, 415-16, 421-22 (S.D.N.Y. 2007) — join in this brief.

of counsel ground constitutes waiver, and this Court should therefore affirm the dismissal without even reaching the merits of the district court's holding. Regardless, even if the Court considers the merits, it must affirm.

The district court found that but for the government's interference, KPMG would have funded Ritchie's defense in this massively complex case. That finding was not clearly erroneous — indeed, it was clearly correct. Substantial evidence, including KPMG's own statements and well-established past practices, proved that KPMG's refusal to pay fees was the direct and intended result of the USAO's pressure. KPMG succumbed to this pressure and withheld defense funding from Ritchie, forcing him to discharge counsel he had chosen to prepare his defense. Thus, the USAO's actions violated Ritchie's Sixth Amendment right to retain counsel of his choice. Under *United States v. Gonzalez-Lopez*, __ U.S. __, 126 S. Ct. 2557 (2006), the constitutional violation was "complete" when Ritchie was compelled to release his chosen counsel — regardless of the quality of representation he might have received.

Contrary to the government's argument, the validity of the district court's ruling does not turn on whether the government "coerced" KPMG's decision. The district court found that the USAO deliberately *caused* the deprivation of Ritchie's constitutional right. That fact is sufficient to establish the Sixth Amendment

violation. Likewise, the government mischaracterizes the issue when it insists that KPMG's refusal to advance defense funds should not be considered state action. The district court dismissed the indictment because of the *government*'s conduct in pressuring KPMG, and such government conduct is obviously state action. In any case, KPMG's withholding of defense funds is properly attributable to the government under the state action jurisprudence because: (1) at the very least, the USAO "significantly encouraged" KPMG's action; (2) KPMG, like other private entities that cooperate with law enforcement, was a "willful participant in joint activity" with the USAO; and (3) the USAO became entwined in the management of KPMG with respect to the defense-funding decision.

The government's remaining arguments also lack merit. First, the government did not "cure" its constitutional violation when an AUSA stated during a court hearing that KPMG had "always" been free to fund Ritchie's defense in the exercise of its business judgment. The deprivation of Ritchie's right to counsel of choice had already occurred at the time of the AUSA's statement, and the statement did nothing to redeem that deprivation. Moreover — putting aside the fact that the district court implicitly found the AUSA's comments to be untrue — the comments were ambiguous at best, and nothing in the record suggests that KPMG understood them to mean that it was now released from the

government's previous insistence that the firm should not pay Ritchie's legal fees.

Second, the government argues that dismissal was an inappropriate remedy because the district court delayed trial and thereby gave defense counsel "more time to prepare for trial." As an initial matter, that argument is waived: the government expressly conceded in the district court that dismissal was the only sanction available to remedy the constitutional violations found by the court. Furthermore, in the context of a violation of the right to counsel of choice, the government's remedy argument is nonsensical — a delay of the trial, however lengthy, will never restore Ritchie's right to counsel of his choice.

Finally, the government's reliance on Supreme Court forfeiture decisions for the proposition that the USAO may lawfully block funding that would otherwise be available to the defense is misplaced. The forfeiture cases are inapposite. Those decisions hold only that a criminal defendant has no Sixth Amendment right to use *forfeitable* assets — that is, property that belongs to the government — to fund his defense. The forfeiture cases do *not* hold that the government may obstruct a defendant's access to lawfully available resources; and other cases make clear that such interference with the freedom to retain counsel of one's choice violates the Sixth Amendment.

For all of these reasons, together with those set forth in the Stein *et al.* and

DeLap *et al*. Briefs, the district court's order dismissing the indictment must be affirmed.

ISSUES PRESENTED

1. Whether the district court clearly erred when it found that the government caused KPMG to withhold defense funds from Ritchie, thereby depriving him of counsel of his choice.
2. Whether the district court abused its discretion by dismissing the indictment as a sanction for the government's violation of Ritchie's Sixth Amendment rights.

STATEMENT OF FACTS

The USAO charged Ritchie, a former partner at the accounting giant KPMG, in "the largest criminal tax case in American history." *Stein v. KPMG, LLP*, 486 F.3d 753, 756 (2d Cir. 2007). The government indicted nineteen defendants, produced over 22 million pages of discovery materials, and proposed to call 70 witnesses and to present approximately 2,000 exhibits at trial. The parties expected the trial to last at least six to eight months. In short, it was a case that required massive resources to fairly contest — resources a large national law firm could uniquely provide.

Ritchie initially retained the law firm of Cadwalader Wickersham & Taft,

which precisely fit this bill. However, the USAO forced Ritchie to abandon that firm — and instead proceed only with a small defense firm that lacked the same range of resources — by causing KPMG to withhold funding for Ritchie's defense that the firm otherwise would have provided. Thus, as a result of the government's deliberate misconduct, Ritchie lost his chosen counsel.

A. The Case Was Massively Complex

The district court found that this case placed "exceptional demands" on the defendants, *United States v. Stein*, 495 F. Supp. 2d 390, 416 (S.D.N.Y. 2007) ("*Stein IV*"), a finding the government does not challenge. As the court observed in its July 16, 2007, opinion:

> The volume of documents produced by the government in this case is enormous. By November 11, 2006, it had turned over more than 22 million pages of material either in electronic or tangible form, and production has continued through recent months. This volume is large even when compared to other complex, white collar prosecutions. Moreover, the discovery continues. Despite an October 2005 discovery deadline, over 1 million pages have been produced since June 1, 2007, and it appears that the end has not been reached.

Id. at 416-17 (citing Dkt. 821 at 4-5; JA 979; Dkt. 1010 at 26 n. 32; Dkt. 1133; Dkt. 1051 at 2-3; Dkt. 855 at 6:6-24).[2]

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[2] "JA" refers to the Joint Appendix filed in this matter, No. 07-3042-cr. "Smith A." refers to the Joint Appendix filed in *United States v. Stein (Smith and Watson)*, No. 06-3999-cr. "Smith Supp. A." refers to the Supplemental Appendix filed in No. 06-3999-cr. "Dkt." refers to the documents lodged in the record on

Likewise, the court stated that the eighteen

> defendants in the opening stage of this case filed 26 motions supported by memoranda of law totaling approximately 1,100 pages. Intensive motion practice has continued since then. The full scope is apparent from the docket sheet. An indication lies in the fact that Westlaw contains twenty-four decisions in this case.

Id. at 418.

Furthermore, the trial itself would have been a massive undertaking. The government designated nearly 70 witnesses and 2,000 exhibits totaling more than 120,000 pages for its case in chief. *Stein IV*, 395 F. Supp. 2d at 418 (citing Dkt. 745 at 5; JA 970-71; Dkt. 903 at 16:10-17). The government optimistically estimated that presentation of its case-in-chief would require approximately four months, and the anticipated overall length of the trial was between six and eight months. Smith A. 907-08. Thus, Ritchie and the other defendants confronted a singularly massive and complex case.

B. Absent Government Interference, KPMG Would Have Funded Its Former Partners' Defenses

As discussed, this exceptionally demanding case would have required enormous resources to litigate — resources that an entity like KPMG could readily marshal. Yet KPMG departed from its past practice of paying its partners' legal

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appeal at the referenced district court docket number.

fees. Instead the firm capped fees related to the investigation and conditioned payment on each employee's full cooperation with the USAO. Further, KPMG completely refused payment to any indicted employee. The USAO caused KPMG's radical departure by threatening to indict the firm, a step KPMG believed would prove fatal.

In 2003, U.S. Deputy Attorney General Larry D. Thompson issued a document entitled *Principles of Federal Prosecution of Business Organizations* (the "Thompson Memorandum"), which, in many respects, was a modest revision of a previous USAO policy document. Unlike its predecessor, however, the Thompson Memorandum was binding on all federal prosecutors. The Thompson Memorandum obliged all United States Attorneys to consider the advancement of legal fees by a business entity — except where such advances were required by law — as a possible indication of an attempt to protect culpable employees and as a factor weighing in favor of indicting the entity. *United States v. Stein*, 435 F. Supp. 2d 330, 338 (S.D.N.Y. 2006) ("*Stein I*"); *see also* Smith A. 1139 (Thompson Memorandum).

The district court twice found that

> KPMG's decision to cut off all payments of legal fees and expenses to anyone who was indicted and to limit and to condition such payments prior to indictment upon cooperation with the government was the direct

> consequence of the pressure applied by the Thompson Memorandum and the USAO. *Absent the Thompson Memorandum and the actions of the USAO, KPMG would have paid the legal fees and expenses of all of its partners and employees both prior to and after indictment, without regard to cost.*

Stein I, 435 F. Supp. 2d at 353 (emphasis added, footnote omitted); *Stein IV*, 495 F. Supp. 2d at 394-409. As discussed in the Stein *et al.* and DeLap *et al*. Briefs, which Ritchie joins, those factual findings were amply supported by the record. To avoid burdening the Court, we will not repeat the whole litany of the government's misconduct. However, several facts that highlight the accuracy of the district court's findings bear brief recitation here.

The government stipulated that KPMG had a long-standing practice of paying its personnel's legal fees "in any civil, criminal or regulatory proceeding involving activities arising within the scope of the individual's duties and responsibilities as a KPMG partner, principal, or employee." *Stein I*, 435 F. Supp. 2d at 340.[3] Furthermore, the record established that KPMG's counsel told the government that it would be a "big problem" to depart from the firm's long-standing practice of paying legal fees because KPMG was a partnership. Smith A. 1146.

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[3] In fact, KPMG paid Ritchie's legal fees in civil and regulatory proceedings involving the same facts at issue in the criminal case. JA 1459-60.

Despite its long-standing practice, however, KPMG did not pay Ritchie's legal fees in connection with the criminal investigation and prosecution of this case, JA 1044-45; *see also* Dkt. 1113 — a decision that was compelled by the USAO's policies and conduct. As the district court observed,

> [The] Thompson Memorandum . . . made clear that advancing attorneys' fees to personnel of a business entity under investigation, except where such advances were required by law, might have been viewed by the government as protection of culpable individuals and thus contribute to a government decision to indict the entity.

Stein IV, 395 F. Supp. 2d at 396. Furthermore,

> Any competent lawyer reading the document would regard a corporate client that was under investigation as being at greater risk of indictment if it advanced legal fees to employees who might be viewed by prosecutors as culpable than if it did not advance legal fees."

Id. at 397. Indeed, KPMG had such a competent lawyer: the company's chief legal officer, former U.S. District Judge Sven Erik Holmes, testified that he thought it indispensable "to be able to say, at the right time with the right audience, we're in full compliance with the Thompson Guidelines." Smith A. 1504. Full compliance was indispensable because an indictment would destroy the firm. Smith A. 613.

USAO attorneys unequivocally confirmed the Thompson Memorandum's message when they met with KPMG's counsel. In early 2004, KPMG was

negotiating with the USAO for a possible deferred prosecution agreement, which KPMG hoped would "save the firm." Smith A. 1189; *see also* Smith A. 1184. Although KPMG had decided to cooperate, it did not decide to withhold defense funds until the USAO brought further pressure to bear. *Stein IV*, 495 F. Supp. 2d at 402 (citing Smith A. 1338 ("No decisions [regarding payment of defense fees] made")).

At a February 2004 meeting between KPMG and USAO attorneys, AUSA Weddle asked whether KPMG planned to pay its partners' fees. Smith A. 365, 1338. When KPMG representatives raised with the USAO the company's long practice of paying its partners' legal fees, an AUSA responded "that the government would take into account KPMG's legal obligations, if any, to advance legal expenses, but referred specifically to the Thompson Memorandum as a point that had to be considered." *Stein I*, 435 F. Supp. 2d at 341 (citing Smith A. 365). The USAO attorneys further stated that "'misconduct' should not or cannot 'be rewarded,'" and that any payment of legal fees would be "'look[ed] at . . . under a microscope.'" *Id*. at 342, 344 (citing and quoting Smith A. 1189, 1200, 1338, 1339). KPMG's attorneys understood that the USAO preferred that KPMG "not pay fees here." Smith A. 1342.

After that meeting, on March 11, 2004, KPMG's counsel sent the USAO a

form letter addressed to KPMG employees who were subjects of the USAO's investigation. Smith A. 1204, 1214-15. The mere fact that KPMG shared with the government the contents of an internal letter to its employees demonstrates that the firm was by this time marching to the government's drum. The letter's content is also damning: it stated that KPMG would pay an individual's legal fees and expenses, up to a maximum of $400,000, on the condition that the individual "cooperate with the government and . . . be prompt, complete, and truthful." Smith A. 1214-15. Most importantly, the letter added a new provision not previously discussed with the government: "payment of . . . legal fees and expenses will cease immediately if . . . [the recipient] is charged by the government with criminal wrongdoing." Smith A. 1215.

As KPMG later explained in a letter to the district court:

> [T]he Thompson memorandum in conjunction with the government's statements relating to payment of legal fees "affected KPMG's determination(s) with respect to the advancement of legal fees and other defense costs to present or former partners and employees . . . ." In fact, KPMG is prepared to state that the Thompson memorandum substantially influenced KPMG's decisions with respect to legal fees.

JA 793. Indeed, even the government admits that "the very purpose of publicly promulgating the Thompson Memorandum . . . was to advise corporations and defense attorneys of the factors that the Government would take into consideration

during a criminal investigation of a corporation," Gov't Br. at 53, and that KPMG's decision was "undoubtedly influenced by the Thompson Memorandum," Gov't Br. at 57.

These facts, along with those discussed in the district court's opinions and the Stein *et al.* and DeLap *et al*. Briefs, establish that the USAO caused KPMG to withhold defense funds from Ritchie.

C. Absent Government Interference, KPMG Would Have Paid for Ritchie's Defense

The government conceded that the superseding indictment in this case charged Ritchie "primarily with conduct that occurred while he was employed at KPMG." Dkt. 1051 at 39. The government further conceded that Ritchie is "similarly situated" to the other defendants who had been KPMG employees or partners — i.e., that to the extent KPMG would have paid its former partners' legal costs in the absence of government interference, it would have paid Ritchie's costs. JA 1392. Thus, it is undisputed that KPMG would have paid for Ritchie's defense if it paid for the other appellees' defenses.

D. Ritchie Lost His Counsel of Choice Because KPMG Refused to Pay for his Defense

The district court found:

In 2004, [Ritchie] retained Cadwalader Wickersham & Taft ("CWT") to

> defend him in the government's investigation. Once the indictment was returned, he wished to continue the services of CWT through trial. He hired also Arguedas, Cassman & Headley, a much smaller firm, as co-counsel. KPMG's refusal to pay his defense costs, however, *left him with insufficient resources to pay both firms* . . . . Accordingly, he terminated CWT. He now is represented only by the Arguedas firm and a solo practitioner.

Stein IV, 395 F. Supp. 2d at 415-16 (emphasis added, footnotes omitted, citing Dkt. 1113).

The evidence fully supported this finding, which the government did not and does not challenge. Ritchie was a partner at KPMG until September 1998, when he left to work for his present employer. Smith A. 137. When Ritchie became aware in May 2004 of the criminal investigation underlying the charges in this case, he hired CWT to represent him. JA 1044-45; Dkt. 1113 ¶ 5. CWT is a nationwide firm, with offices in six cities and more than 700 attorneys. Ritchie wanted those extensive resources available to him for his defense. By June 2004, Ritchie's CWT attorneys were negotiating with KPMG attorneys for reimbursement of Ritchie's legal costs. JA 1044-45; Dkt. 1113 ¶ 7.

In late 2005, Ritchie decided to hire Arguedas, Cassman & Headley, LLP ("ACH, LLP"), to act as co-counsel during trial. Dkt. 1113 ¶ 10. He intended CWT to handle the enormous task of reviewing and coding the already voluminous discovery, the construction of a searchable and integrated database,

and the labor-intensive aspects of fact and witness investigation and general case management and organization. *Id.* ¶ 10. Ritchie intended that the two firms would share the development of trial and litigation strategy, as well as actual implementation of such strategies. *Id.* ¶ 10.[4]

By the end of 2005, however, CWT's negotiations with KPMG had broken down, and Richie understood that KPMG had reneged on its previous practice and would not provide his defense fees. JA 1045; Dkt. 1113 ¶ 7. After analyzing CWT's bills in light of KPMG's decision not to fund his defense, Ritchie determined that he could not afford to pay CWT to continue representing him through trial. Dkt. 1113 ¶¶ 11-14. Ritchie was therefore compelled to discharge CWT and ask ACH, LLP, a much smaller firm (adding one additional lawyer from the Law Offices of Ann C. Moorman), to manage and defend the entire case without CWT's infrastructure or assistance. *Id.* ¶ 15. Thus, as a consequence of KPMG's refusal to pay — itself a result of the government's conduct — Ritchie lost the law firm of his choice together with the critical resources that this large, nationwide firm would have committed to his defense preparation. *Id.* ¶ 15.

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[4] Although hiring ACH, LLP would have necessitated additional billing by several ACH, LLP attorneys, Ritchie anticipated that those added costs would have been partially offset by CWT's release of a few of its senior attorneys from the case. Dkt. 1113 ¶ 12.

E. The Government Did Not "Cure" Its Misconduct

At a hearing in March 2006, two years after KPMG succumbed to government pressure to withhold defense funding from Ritchie and other KPMG partners, the district court asked the government to state its current position regarding such funding. Contrary to the suggestion in the government's brief, Government Opening Brief ("Gov't Br.") at 31-44, the AUSA did not state that the government would now agree that KPMG could fund the defense. Instead, the AUSA insisted that the government had always taken the position that KPMG was free to provide defense funding to appellees, if it chose to do so, without fear of consequences from the government:

> THE COURT: . . . Is the government prepared at this point to commit that the government has no objection whatsoever to KPMG exercising its free and independent business judgment as to whether to advance defense costs to these defendants and that if it were to elect to do so the government would not in any way consider that in determining whether it had complied with the DPA?
>
> [AUSA] WEDDLE: *That's always been the case, your Honor.* That's fine. We have no objection to that.
>
> THE COURT: That's always been the case?
>
> MR. WEDDLE: *They can always exercise their business judgment. As you described it, your Honor, that's always been the case.* It's the case today, your Honor.

Smith A. 249-50 (emphasis added).

The AUSA's assertion was false and disingenuous, and contradicted the district court's express findings. The USAO had made clear to KPMG since February 2004 that the government would evaluate KPMG's financial support for appellees "under a microscope" as it considered whether to indict KPMG.

Moreover, contrary to the government's suggestion on appeal, the AUSA's statement cannot fairly be construed as an affirmative missive to KPMG that, whatever it had previously understood, the government now had no objections to the firm's financing of its former partners' defenses. Mr. Weddle stated only that the government had always permitted KPMG to "exercise their business judgment," and that it would continue to take the same position. But the record shows that KPMG's business judgment had been strongly influenced by the implicit and explicit threats in the Thompson Memorandum and in the USAO attorneys' statements to KPMG lawyers and executives. There is no evidence suggesting that KPMG understood or considered the government's statement to constitute a change of policy. In fact, the only other evidence cited by the government in support of the proposition that it "cured" the constitutional violation is a statement the government now admits it drafted *but never submitted to the district court*. *See* October 29, 2007 Letter from AUSA Metzner to Court. The draft statements would have explicitly proffered that the USAO "would not

find it to be a violation of the Deferred Prosecution Agreement for KPMG to change its decision and voluntarily pay legal fees for th[e] indicted defendants." Gov't Br. at 33-34. The fact that the USAO drafted that sentence but then elected not to submit it to the court — and apparently never submitted a similar statement directly to KPMG — speaks far more cogently than the AUSA's ambiguous statements in court: KPMG remained subject to the government's pressure not to fund Ritchie's defense.

Furthermore, even if the government had intended its March 2006 statement to release KPMG from its previous agreement not to fund appellees' defenses, it was far too little and far too late. KPMG had already made its decision not to provide defense funds to the appellees, and it is fanciful to suggest that the firm could have reversed course at that late stage of process. No evidence in the record supports this flight of fancy, and the district court's finding that the AUSA's statements did not "cure" the violation, *see Stein I*, 435 F. Supp 2d at 374, was not clearly erroneous.

F. The District Court Attempted To Fashion An Alternative Remedy Short of Dismissal

In *Stein I,* the district court found that the USAO's conduct violated appellees' constitutional rights, but sought to remedy those violations without

dismissing the indictment. 435 F. Supp. 2d at 373-80. The court found that it could not provide monetary relief against the government. *Id*. at 374-76. However, the court observed that the appellees could seek monetary relief from KPMG, and opened a civil proceeding to permit such relief under the court's ancillary jurisdiction. *Id*. at 377-80. The court also observed that the government could likely press KPMG into paying defense fees, and noted the possibility of dismissal if no other remedy succeeded in restoring to the appellees the funds that KPMG would otherwise have paid. *Id*. at 380. Thus, the district court carefully considered and attempted to invoke remedies short of dismissal.

G. The District Court Dismissed the Charges Against Ritchie on Three Grounds, and the Government Conceded Dismissal Was Warranted

None of the potential remedies short of dismissal suggested by the district court succeeded. On appeal by KPMG, this Court held that the district court could not assert ancillary jurisdiction over a civil action to force KPMG to pay the defense funds, *Stein v. KPMG, LLP*, 486 F.3d 753, 756 (2d Cir. 2007), and KPMG did not pay the funds to any appellee. Thus, when appellees renewed their motion to dismiss the indictment, the court had no options short of dismissal for restoring the appellees to the position in which they would have stood absent the government's unconstitutional interference.

Even the government recognized this fact. In its Opposition to Defendants' Renewed Motion to Dismiss the Indictment in the district court, the government conceded that dismissal was the only proper remedy for the constitutional violations the district court found in *Stein I*. Dkt. 1051 at 2-9. The government's memorandum stated:

> Given the logic and express holdings of the Court's decision in *Stein I*, and given (i) the ruling by the Court of Appeals on the ancillary jurisdiction question and (ii) the fact that KPMG steadfastly declines to pay the defendants' fees, *it is difficult to understand how anything short of dismissal of the Indictment would suffice*.

Dkt. 1051 at 5 (emphasis added); *see also id.* at 9 ("[I]f the Court's opinion in *Stein I* stands, we have concluded that no remedy short of dismissal appears adequate to vindicate the interests identified in that opinion."); JA 1375-77 (AUSA Hillebrecht repeating the government's position at oral argument).

The district court found that the government violated three of Ritchie's fundamental rights: the Sixth Amendment right to counsel of choice, *Stein IV*, 495 F. Supp. 2d at 421-22, and the constitutional rights to a fair trial and to present a defense free from government interference, *Stein IV*, 495 F. Supp. 2d at 423-25, 427-28; *Stein I*, 435 F. Supp. 2d at 356-73. The court found that each constitutional violation required dismissal of the indictment against Ritchie. *Stein IV*, 495 F. Supp. 2d at 422, 423-25, 427-28.

SUMMARY OF ARGUMENT

The government has waived any challenge to the district court's conclusion that the USAO deprived Ritchie of his Sixth Amendment right to choose his counsel. Furthermore, the district court's ruling was correct on its merits.

The court's essential factual findings — that KPMG withheld defense funding from Ritchie as a result of the government's pressure and that Ritchie was thereby compelled to proceed without counsel of his choice — are supported by the evidence. Indeed, with the exception of the fact and effect of the USAO's pressure on KPMG, the district court's findings are undisputed. Thus, the only questions posed are (1) whether district court correctly determined that the government's conduct caused the deprivation of Ritchie's chosen counsel, and (2) whether dismissal was the appropriate remedy for that misconduct.

The district court correctly determined that the USAO caused KPMG to deny Ritchie defense funding and thereby forced Ritchie to abandon CWT. A deprivation of chosen counsel works a Sixth Amendment violation that is "'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received." *United States v. Gonzalez-Lopez*, __ U.S. __, 126 S. Ct. 2557, 2563 (2006). Thus, the district court properly ruled that the government's conduct

violated Ritchie's Sixth Amendment rights.

Likewise, given the constitutional violation, the district court appropriately dismissed the indictment. The fundamental nature of the violation, together with the court's inability to otherwise restore the *status quo ante*, left the court with no other option.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews "constitutional claims *de novo*, but accept[s] a district court's factual findings unless they are clearly erroneous." *United States v. Desena*, 287 F.3d 170, 176 (2d Cir. 2002). A finding of fact is clearly erroneous only if, after reviewing all of the evidence, the Court is left "with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Id*. at 573-74.

The district court's decision that dismissal of the indictment was the appropriate remedy for any constitutional violation is reviewed for abuse of discretion. *See United States v. Artuso*, 618 F.2d 192, 196 (2d Cir. 1980); *United States v. Fields*, 592 F.2d 638, 646-647 (2d Cir. 1978). It may therefore be reversed only if it rests on an error of law or a clearly erroneous factual finding, or if it "cannot be located within the range of permissible decisions." *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 169 (2d Cir. 2001).

This case turns on a factual issue that the district court resolved in favor of Ritchie and the other appellees: whether the government caused KPMG to withhold defense funds it would otherwise have paid. The government can prevail in this Court only by establishing that the district court's finding was clearly erroneous — a high hurdle the government cannot even approach. As we demonstrate, the district court's findings were correct. Likewise, the district court's determination that dismissal was the only appropriate remedy was correct and lay well within its discretion.

II. THE USAO VIOLATED RITCHIE'S SIXTH AMENDMENT RIGHT TO RETAIN COUNSEL OF HIS CHOICE

The government's brief does not directly dispute the district court's holding that the USAO violated Ritchie's Sixth Amendment right to counsel of his choice.

Accordingly, the government has waived any challenge to that independent basis for the dismissal. Furthermore, the district court's holding was clearly correct on its merits. The violation of Ritchie's right to choose his counsel provides a compelling basis to affirm the dismissal.

A. The Government Has Waived Any Challenge to this Ground for Dismissal

The government does not directly challenge the district court's finding that the USAO violated Ritchie's Sixth Amendment rights by depriving him of the ability to proceed with counsel of his choice. Indeed, the government's brief scarcely mentions that ground for dismissal. Issues not sufficiently argued in an appellant's opening brief are deemed waived. *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) (citing *Frank v. United States*, 78 F.3d 815, 823-33 (2d Cir. 1996), *vacated on other grounds*, 521 U.S. 1114 (1997)); *see also United States v. Maniktala*, 934 F.2d 25, 27 (2d Cir. 1991); Fed. R. App. P. 28(a)(6). Accordingly, the government has waived any challenge to the district court's holding concerning counsel of choice, and the dismissal of the indictment against Ritchie must be affirmed on this ground alone.

B. The Government's Actions Deprived Ritchie of Counsel of His Choice

If this Court should reach the merits of the question, the district court's conclusions that the government violated Ritchie's right to chosen counsel and that the violation warranted dismissal must still be affirmed.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Amendment "grants to the accused personally the right to make his defense . . . . for it is he who suffers the consequences if the defense fails." *Faretta v. California*, 422 U.S. 806, 819 (1975) (footnote omitted). "[T]he most important decision a defendant makes in shaping his defense is his selection of an attorney." *United States v. Gonzalez-Lopez*, 399 F.3d 924, 395 (8th Cir. 2005) (quoting *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979)), *aff'd* __ U.S. __, 126 S. Ct. 2557 (2006). Thus, a fundamental element of the Sixth Amendment right to control one's defense "is the right of a defendant who does not require appointed counsel to choose who will represent him." *United States v. Gonzalez-Lopez*, __ U.S. __, 126 S. Ct. 2557, 2561 (2006) (quoting *Wheat v. United States*, 486 U.S. 153, 159 (1988)). In short, "the Sixth Amendment guarantees the defendant the right to be

represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *Id*. (quoting *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-625 (1989)).

The unjustified interference with a defendant's choice of counsel automatically requires reversal of a conviction. In *Gonzalez-Lopez*, the Supreme Court rejected the government's contention that the Sixth Amendment violation wrought by the deprivation of counsel of choice "is not 'complete' unless the defendant can show that substitute counsel was ineffective." *Id*. While "the purpose of the rights set forth in th[e Sixth] Amendment is to ensure a fair trial[,] . . . it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." *Id*. at 2562. The Sixth Amendment right to counsel "commands, not that a trial be fair, but that a particular guarantee of fairness be provided — to wit, that the accused be defended by the counsel he believes to be best." *Id*.

> The 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. In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation "complete."

Id. (quotation marks and citations omitted).

The *Gonzalez-Lopez* Court further considered whether the erroneous deprivation of counsel of choice was subject to harmless error analysis. *Id*. at 2563. After briefly reviewing the relevant jurisprudence, the Court found that no such inquiry is warranted:

> In *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991), we divided constitutional errors into two classes. The first we called "trial error," because the errors "occurred during presentation of the case to the jury" and their effect may "be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." *Id.*, at 307-308, 111 S. Ct. 1246 (internal quotation marks omitted). These include "most constitutional errors." *Id.*, at 306, 111 S. Ct. 1246. The second class of constitutional error we called "structural defects." These "defy analysis by 'harmless-error' standards" because they "affec[t] the framework within which the trial proceeds," and are not "simply an error in the trial process itself." *Id.*, at 309-310, 111 S. Ct. 1246.

Gonzalez-Lopez, 126 S. Ct. at 2563-64 (footnote omitted). The Court held that "erroneous deprivation of the right to counsel of choice, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error." *Id*. at 2564 (quotation marks omitted).

Here, the government's violation of Ritchie's Sixth Amendment right to chosen counsel involved a two-step process. First, the government acted directly upon KPMG, causing the company to withhold defense funds it otherwise would

have paid. Second, this withholding of funds forced Ritchie to discharge his chosen counsel, CWT.

The government has never challenged the second step in the causal chain, either in the district court or on appeal. Ritchie demonstrated in the district court that KPMG's withholding of funds forced him to discharge CWT, and the government did not, and does not, contest that fact. Indeed, the government expressly conceded below that Ritchie was "similarly situated" to the other KPMG defendants because (1) if KPMG paid for its former partners' defenses, it would have paid for Ritchie's defense; and (2) Ritchie did not have an adequate alternative source of those funds. *See* JA 1392. The government has therefore waived any argument that Ritchie was not forced to discharge CWT because of KPMG's refusal to pay defense costs. *United States v. Feliz*, 467 F.3d 227, 230 n.1 (2d Cir. 2006) (failure to raise argument on appeal constitutes waiver); *ABB Indus. Sys., Inc., v. Prime Tech., Inc.*, 120 F.3d 351, 360 n.5 (2d Cir. 1997) (same; citing Fed. R. App. P. 28(a)(6)); *United States v. Griffiths*, 47 F.3d 74, 77 (2d Cir. 1995) (failure to raise argument in district court precludes raising it on appeal); *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir. 1977) ("The law in this Circuit is clear that where a party has shifted his position on appeal and advances arguments available but not pressed below, and where that party has had ample

opportunity to make the point in the trial court in a timely manner, waiver will bar raising the issue on appeal." (citations omitted)).

The only disputed factual issue is whether the government caused KPMG to deny Ritchie defense funding. The district court twice found that the government's conduct did have this causal effect. *Stein IV*, 495 F. Supp. 2d at 394-409; *Stein I*, 435 F. Supp. 2d at 336-350. Those factual findings must be accorded deference on appeal and must be accepted unless clearly erroneous. *Desena*, 287 F.3d at 176.

Far from clearly erroneous, the district court's findings were fully supported by the evidence. As demonstrated in this and the Stein *et al.* and DeLap *et al*. Briefs, the government caused KPMG to withhold funds it would otherwise have paid for Ritchie's defense. Although the government attacks the district court's findings on a number of grounds, none is persuasive. Indeed, the government's attacks do not even attempt to address the choice-of-counsel violation. The government's actions permanently denied Ritchie the counsel of his choice. Under *Gonzalez-Lopez*, the constitutional violation was therefore complete and irremediable absent dismissal.

C. The Government's Arguments that the Constitutional Violations Were "Cured" or Inadvertently Remedied are Irrelevant and Wrong

The government places primary reliance on its contention that it "cured" any constitutional violation on March 30, 2006, when an AUSA stated in court that KPMG had always been free to pay defense funds. Gov't Br. at 31-44. The heart of the government's argument is that once the AUSA made the statement, KPMG was free to fund the appellees' defenses, and the government cannot be held responsible for the company's continued failure to pay defense funds. Gov't Br. at 31-40. Alternatively, the government asserts that the district court inadvertently tailored sufficient relief by delaying the trial for over a year, thus permitting defense counsel "more time to prepare for trial." Gov't Br. at 41-43. In this manner, the government avers, the district court complied with the mandate of *United States v. Morrison*, 449 U.S. 361 (1981), which required the court to fashion the narrowest possible relief that ensured "effective assistance of counsel and a fair trial." Gov't Br. at 41 (quoting *Morrison*, 449 U.S. at 364-65). These arguments utterly fail to address the deprivation of chosen counsel ground for dismissing the indictment against Ritchie.

1. The AUSA's Statement Did Not "Cure" the Deprivation of Counsel of Choice

The government's dubious contention that KPMG was free to pay fees beginning in March 2006 completely ignores the district court's finding that Ritchie suffered deprivation of counsel of choice *in late 2005*. The deprivation thus occurred months before the government's supposed "cure," and nothing in the record demonstrates that Ritchie could somehow have reversed course even if KPMG had subsequently begun payment of defense funds — which, of course, did not happen. Indeed, even being deprived of chosen counsel for just the months between indictment and the AUSA's statement would constitute a constitutional violation on its own. As the Supreme Court has recognized,

> Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial . . . . Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all.

Gonzalez-Lopez, 126 S. Ct. at 2564-65. Not surprisingly, the government makes no effort to argue that its supposed "cure" remedied the deprivation of Ritchie's chosen counsel — it did not.

In any event, the government's construction of the AUSA's statement is strained and unreasonable. The statement upon which the government relies simply reinforced the government's past improper pressure. When the district judge inquired whether the government was prepared to let KPMG pay the defendants' legal fees, the AUSA responded, "That's always been the case your Honor," and continued, "They can always exercise their business judgment." Smith A. 249-50. But the district court, supported by ample evidence, found that KPMG's "business judgment" had long been impaired by government pressure that caused the company to abandon long-standing practice and refuse to pay defense funds. *Stein IV*, 495 F. Supp. 2d at 394-409. Thus, the government's "commitment" to adhere to the same position it had always taken was hardly reassuring.

Indeed, the equivocation in the government's position is revealed by a citation in its brief to this Court. As discussed, the government mistakenly cited a draft letter that would have explicitly proffered that the USAO "would not find it to be a violation of the Deferred Prosecution Agreement for KPMG to change its decision and voluntarily pay legal fees for th[e] indicted defendants." Gov't Br. at 33-34. But the government never sent that letter to the district court, apparently preferring to let AUSA Weddle's ambiguous statement stand without elaboration.

The fact that the government specifically chose not to put an explicit reassurance in writing speaks cogently: whatever the government's intention, there is no evidence in the record that KPMG understood that the AUSA's March 2006 statement constituted changed circumstances.

Furthermore, whatever its intended impact, the AUSA's statement came much too late to have any effect. As the district court observed, it was simply not realistic to expect KPMG to make an independent judgment in 2006 as if it had never experienced the government pressure in the first place. *Stein I*, 435 F. Supp. 2d at 374. As a partnership, KPMG has sought to avoid the appearance that it is willing to sacrifice its own partners in order to ward off indictment. *See* Smith A. 1146. If KPMG had reversed course and paid fees after the government's purported assurances, that reversal would have constituted a direct admission that KPMG did originally withhold fees — and thus sacrifice its own partners — simply to please the government and avoid indictment. Furthermore, the government has consistently maintained — even before this Court — that it did not cause KPMG's decision to withhold defense funds. In that context, KPMG's reversal of its funding decision would have severely undermined the government's claim that it had not caused KPMG's original decision to withhold funds. Unless the USAO had affirmatively prodded KPMG to advance fees — which it expressly

refused to do — KPMG could not be expected to risk subverting the USAO's legal position by re-assuming responsibility for appellees' defense costs.

2. Trial Delay Was Not a Remedy and *Morrison* is Inapplicable

The government's argument concerning the proper remedy under *Morrison* fails for two reasons. First, the government did not preserve the issue below and it is not properly before this Court. Second, the argument is completely inapposite in the context of a deprivation of chosen counsel.

a. The Remedy Argument Is Waived

"[W]here a party has shifted his position on appeal and advances arguments available but not pressed below . . . waiver will bar raising the issue on appeal." *Braunig*, 553 F.2d at 780; *see also Griffiths*, 47 F.3d at 77. The government has shifted its position and advanced an argument it did not press below. In its Opposition to Defendants' Renewed Motion to Dismiss the Indictment in the district court, the government conceded that dismissal was the only proper remedy for the constitutional violations the district court found in *Stein I*. Dkt. 1051 at 2-9. The government's memorandum stated:

> Given the logic and express holdings of the Court's decision in *Stein I*, and given (i) the ruling by the Court of Appeals on the ancillary jurisdiction question and (ii) the fact that KPMG steadfastly declines to pay the defendants' fees, *it is difficult to understand how anything short of dismissal of the Indictment would suffice*.

Dkt. 1051 at 5 (emphasis added); *see also id.* at 9 ("[I]f the Court's opinion in *Stein I* stands, we have concluded that no remedy short of dismissal appears adequate to vindicate the interests identified in that opinion."); JA 1375-77 (AUSA Hillebrecht repeating the government's position at oral argument).

The government attempts to avoid waiver by insisting that it never conceded the correctness of *Stein I*. Gov't Br. at 43 fn.*. But the government's objection to *Stein I*'s holdings did not preserve the argument that a delayed trial was a sufficient remedy for its misconduct. *Stein I* specifically left open the question of remedy, and never suggested that dismissal was the only appropriate remedy. 435 F. Supp. 2d at 373-80 ("[T]he Court declines to consider additional relief at this time, although it may do so in the future if KPMG does not, for one reason or another, advance defense costs.").[5] Thus, preserving a challenge to the "legal and factual premises underlying" *Stein I*, Dkt. 1051 at 9, did nothing to preserve a challenge to the remedy imposed by the court in *Stein IV*.

[5] In *Stein I*, the district court rejected only one proposed remedy: the government's argument "that any relief should be limited to requiring KPMG to consider anew whether it wishes to advance expenses to the defendants, now free of the threat of government retaliation by virtue of the government's recent statement that it does not object to KPMG doing as it pleases." 435 F. Supp. 2d at 373-74. The government did not suggest to the district court that the constitutional violations could be remedied by delaying the trial.

b. The Remedy Argument Does Not Apply to the Choice of Counsel Violation

Leaving aside the question of waiver, the argument that the constitutional deprivation was remedied when the district court gave defense counsel "more time to prepare for trial" lacks any merit in the context of a choice of counsel violation. As discussed, *supra*, the Sixth Amendment right to counsel of choice "commands, not that a trial be fair, but that a particular guarantee of fairness be provided — to wit, that the accused be defended by the counsel he believes to be best." *Gonzalez-Lopez*, 126 S. Ct. at 2562. "[T]he right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation 'complete.'" *Id*.

It is true that some Sixth Amendment requirements derive from "the Sixth Amendment's purpose of ensuring a fair trial," and those violations need be remedied only where they work demonstrable prejudice or implicate the fairness of the trial. *Id*. at 2562-63. But the right to counsel of choice is fundamentally different: "The right to select counsel of one's choice . . . . has been regarded as the root meaning of the constitutional guarantee." *Id*. at 2563 (footnote omitted). "Where the right to be assisted by counsel of one's choice is wrongly denied,

therefore, *it is unnecessary to conduct an ineffectiveness or prejudice inquiry* to establish a Sixth Amendment violation." *Id*. at 2563 (emphasis added).

Morrison's inquiry into prejudice is thus irrelevant in the context of a deprivation of counsel of choice because the deprivation itself *is* the prejudice. *See United States v. Flanders*, 491 F.3d 1197, 1216 (10th Cir. 2007) (recognizing *Gonzalez-Lopez*'s automatic-reversal rule in cases of wrongful deprivation of choice of counsel); *United States v. Arthur*, No. 04-CR-122, 2007 WL 81879 at *1 (E.D. Wis. Jan. 8, 2007) ("In *Gonzales-Lopez*, the Court held that denial of 'counsel of choice' is a structural error warranting automatic reversal."); *United States v. Liszewski*, No. 06-CR-130 (NGG), 2006 WL 2376382 at *8 (E.D.N.Y. Aug. 16, 2006) (under *Gonzalez-Lopez*, "if counsel is wrongly disqualified, the defendant is granted *automatic* reversal on appeal, notwithstanding the fact that the ensuing trial was by all accounts fair" (emphasis in original)). Thus, the USAO's wrongful deprivation of Ritchie's counsel of choice has not been and cannot be repaired by pretrial delay.

Indeed, there was *no* remedy short of dismissal that would mitigate the violation. *Gonzalez-Lopez* and its progeny establish that a defendant may not be improperly forced to trial without the services of his chosen counsel. Even the *Morrison* Court recognized that dismissal of an indictment could be appropriate

when there is continuing prejudice from the constitutional violation that cannot be remedied by a new trial or suppression of evidence. 449 U.S. at 366 n.2. Here the continuing prejudice is easily demonstrable: Ritchie has been denied his choice of counsel, and there is no way to make him whole. Thus, Ritchie cannot be tried without violating his fundamental Sixth Amendment rights, and dismissal is the proper remedy. *Compare United States v. Singer*, 785 F.2d 228, 237 (8th Cir. 1986) (finding no dismissal necessitated by government interference with defendant's counsel of choice because the district court remedied the government's misconduct in a manner that permitted the defendant to retain his chosen counsel).

D. The Government's "Coercion" Argument Attacks a Straw Man; the Government Caused KPMG to Withhold Funds

The government next proffers two related arguments: (1) the government did not "coerce" — in the sense that word is used in the confession jurisprudence — KPMG into denying defense funding, Gov't Br. at 45-53; and (2) KPMG's refusal to pay defense funds was not "state action," Gov't Br. at 55-63. The government never raised these points before the district court in the context of appellees' fee motion, and they are therefore forfeited. *See, e.g., Wal-Mart Stores,*

Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 124 n.29 (2d Cir. 2005); *Griffiths*, 47 F.3d 74, 77. In any event, both arguments fail on their merits.

1. Causation, Not Coercion, Is the Issue: The USAO Caused the Constitutional Deprivation

The government inexplicably argues that KPMG was not "coerced" into denying defense funding. Although the evidence clearly shows that the government did coerce KPMG, coercion is not required here. Rather, as demonstrated by *Webb v. Texas*, 409 U.S. 95 (1972), the issue is simply whether the government *caused* the deprivation of Ritchie's constitutional right.

The *Webb* Court considered whether a trial judge deprived a defendant of his due process right to present his defense by improperly admonishing a potential defense witness, causing the witness to refuse to testify. *Id*. at 95-97. The state argued that "there was no showing that the witness had been intimidated by the admonition or had refused to testify because of it." *Id*. at 97. The Court disagreed, finding that the evidence "strongly suggest[ed] that the judge's comments *were the cause* of [the witness]'s refusal to testify." *Id*. (emphasis added).

The *Webb* Court thus "took pains to zero in on the causative link between the [trial judge's] hectoring and the testimonial gap," implying that "had the

witness been unwilling to testify in petitioner's behalf all along, the judge's comments, though wrong, could not have been a causative factor." *United States v. Hoffman*, 832 F.2d 1299, 1303 (1st Cir. 1987). Accordingly, it is clear that "causation is an essential building block in the edifice of a sixth amendment claim" alleging a violation of the right to present defense witnesses. *Id*. "There can be no violation of the defense's right to present evidence . . . unless some contested act or omission (1) can be attributed to the sovereign and (2) *causes* the loss or erosion of testimony." *Id*. (emphasis added).

This Court adheres to the same causation principle in the context of alleged Sixth Amendment violations involving government influence on a third party. In *Singleton v. Lefkowitz*, 583 F.2d 618, 624 (2d Cir. 1978), the defense subpoenaed a potential exonerating witness. After arresting the witness on a material warrant, the police released him because a prosecutor erroneously informed them that the warrant was defective. The witness then failed to appear in court, and the defendant was convicted. On appeal from the district court's denial of habeas relief, this Court held that a state is "responsible" for the absence of a witness if it "wrongfully *causes*" the witness to become unavailable. *Id*. (quoting Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567, 596 (1978); emphasis added). Because the

witness would have been available to testify but for the state prosecutor's conduct, the defendant's Sixth Amendment right to compulsory process was violated. *Id*. at 624-625; *see also, e.g., Griffin v. Davies*, 929 F.2d 550, 553 (10th Cir. 1991) ("To establish a fourteenth amendment due process violation based on the denial of the right to compulsory process . . . . [t]here must be a plausible showing that an act by the government *caused* the loss or erosion of testimony." (emphasis added)); *United States v. Pinto*, 850 F.2d 927, 932 (2d Cir. 1988) (government's "intimidation or threats that dissuade a potential defense witness from testifying may infringe a defendant's due process rights" if "the government's conduct interfered substantially with a witnesses's 'free and unhampered choice' to testify," and the "witnesses's decision resulted from the government's conduct."); *United States v. Weddell*, 800 F.2d 1404, 1412 (5th Cir. 1986) (remanding in part for consideration of whether a defense witness, "except for the actions of the government, would have indeed testified for" the defense); *United States v. Morrison*, 535 F.2d 223, 227-28 (3d Cir. 1976) (constitutional violation established upon finding that prosecutor's remarks to a witness caused the witness to refuse to testify for the defense).[6]

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[6] The defense witness cases also involve a prejudice inquiry that asks whether the lost testimony was material and favorable to the defense. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 871 (1982); *Hoffman*, 832 F.2d at

This case presents an analogous issue: whether the government caused KPMG to withhold funding for Ritchie's defense. The district court resolved the dispute in Ritchie's favor, *Stein I*, 435 F. Supp. 2d at 353; *Stein IV*, 495 F. Supp. 2d at 394-409, and further found that the government's conduct deprived Ritchie of his counsel of choice, *Stein IV*, 495 F. Supp. 2d at 415-16. The government concedes that KPMG's decision to withhold funds was "undoubtedly influenced by the Thompson Memorandum," Gov't Br. at 57, yet it implies that the district court's findings were nonetheless clearly erroneous because KPMG's decision was "ultimately its own." Gov't Br. at 51.

The government's argument is analogous to a defense frequently raised in *Bivens* and § 1983 cases. In such cases, defendants deny responsibility for a constitutional injury by asserting that a third party's "intervening" decision broke the "causal chain" between the defendant's actions and the injury. *See Zahrey v. Coffey*, 221 F.3d 342, 349-52 (2d Cir. 2000) (canvassing cases). But this Court's jurisprudence conclusively demonstrates that the "intervening decision" argument fails here: the deprivation of Ritchie's chosen counsel was "the legally cognizable

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1303. As discussed in Part II.C.2, *supra,* such a prejudice inquiry is not relevant in the context of a violation of the right to counsel of choice.

result" of the government's conduct. *Id*. at 349; *see also Higazy v. Templeton*, 505 F.3d 161, 175-77 (2d Cir. 2007) (following *Zahrey*).

Under the constitutional tort jurisprudence, a government actor is legally responsible for the "reasonably foreseeable" results or "natural consequences" of his actions. *Higazy*, 505 F.3d at 175-77; *Zahrey*, 221 F.3d at 349-51. A third party's intervening decision will break the "causal chain" between the defendant's acts and the constitutional harm only if the intervening decision is not reasonably foreseeable. *Higazy*, 505 F.3d at 177. In particular, an intervening decision does *not* break the causal chain if the intervening decision-maker fails to exercise "truly independent judgment" because the judgment is compromised by "pressure or misleading information provided by the actor whom the plaintiff seeks to hold liable." *Zahrey*, 221 F.3d at 351-52 (citing cases); *see also Higazy*, 505 F.3d at 177.

Here, the evidence shows that the government caused the deprivation, and the district court did not clearly err in so finding. KPMG did not exercise "truly independent judgment" when it withheld defense funds from Ritchie. The Thompson Memorandum and the USAO's pressure proscribed the firm's options, and KPMG's failure to pay for Ritchie's defense was a reasonably foreseeable — indeed, an entirely intended and predictable — result of the government's conduct.

As discussed in the Facts section, *supra*, and in the Stein *et al.* and DeLap *et al*. Briefs, the government stipulated that KPMG had a long-standing practice of paying its partners' legal fees, and KPMG's counsel told the government that departing from that practice in this case would be a "big problem." Nonetheless, because of the deadly threat of indictment and the USAO's pressure, KPMG eventually refused to pay appellees' legal fees.

The Thompson Memorandum — a policy document issued by the government "to advise corporations and defense attorneys of the factors that the Government would take into consideration during a criminal investigation of a corporation," Gov't Br. at 53 — by itself accomplished much of the decisive pressure. KPMG was vitally threatened because it knew that an indictment would destroy the firm. Smith A. 613. Thus, the company's chief legal officer testified that he thought it indispensable "to be able to say, at the right time with the right audience, we're in full compliance with the Thompson Guidelines." Smith A. 1504.

Furthermore, the USAO affirmed and emphasized the Thompson Memorandum's missive. At a meeting between KPMG and the USAO regarding cooperation, an AUSA stated "that the government would take into account KPMG's legal obligations, if any, to advance legal expenses, but referred

specifically to the Thompson Memorandum as a point that had to be considered." *Stein I*, 435 F. Supp. 2d at 341 (citing Smith A. 365). The USAO further stated that "'misconduct' should not or cannot 'be rewarded,'" and that any payment of legal fees would be "'look[ed] at . . . under a microscope.'" *Id*. at 342, 344 (citing and quoting Smith A. 1189, 1200, 1338, 1339). KPMG believed this meant the USAO would disapprove of KPMG paying defense funds. Smith A. 1342.[7] After the meeting, and in clear response to this pressure, KPMG adopted a new policy: "payment of . . . legal fees and expenses will cease immediately if . . . [the recipient] is charged by the government with criminal wrongdoing." Smith A. 1215.

In short, the evidence established that KPMG succumbed to the USAO's pressure, and the district court correctly found that the government caused the deprivation of Ritchie's Sixth Amendment right to counsel of his choice.

[7] The government points to testimony by an AUSA that the USAO permitted another subject of the investigation, HVB, to pay its employees' legal fees without pressure. Gov't Br. at 52-53 (citing Smith A. 454). Given the wealth of evidence that the USAO treated KPMG radically differently, and the lack of evidence that KPMG was aware of the USAO's purported treatment of HVB, this testimony avails the government nothing.

2. The Constitutional Deprivations Must be Considered State Action

The government also argues that KPMG's refusal to advance defense funds should not be considered state action, and that the constitution was therefore not implicated by KPMG's withholding of funds. Gov't Br. at 55-63. That argument again mischaracterizes the issue. The district court dismissed the indictment because of the *government's own conduct* in pressuring KPMG to withhold defense funds. The Thompson Memorandum and USAO's conduct enforcing the Memorandum were unquestionably state action. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) ("The involvement of a [government] official . . . plainly provides the state action essential to show" a constitutional violation). As discussed above, the true dispute — which must be resolved in favor of Ritchie — is whether this government action *caused* the constitutional deprivation. *See Hoffman*, 832 F.2d at 1303 (recognizing that state action and causation are separate inquiries).

In any event, even considered under the erroneous legal test advanced by the government, the state action argument fails: KPMG's refusal to provide defense funds was state action. State action may be found if there is a "close nexus between the State and the challenged action" such that the conduct "may be

fairly treated as that of the State itself." *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 296 (2001) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)). That close nexus existed here.

The *Brentwood* Court observed that "[w]hat is fairly attributable is a matter of normative judgment," *id*. at 295, and reviewed prior cases that traced the contours of the normative inquiry:

> We have . . . held that a challenged activity may be state action when it results from the State's exercise of "coercive power," [*Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)], when the State provides "significant encouragement, either overt or covert," *ibid.*, or when a private actor operates as a "willful participant in joint activity with the State or its agents," *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982)] (internal quotation marks omitted). We have treated a nominally private entity as a state actor when it is controlled by an "agency of the State," *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*, 353 U.S. 230, 231, 77 S. Ct. 806, 1 L. Ed. 2d 792 (1957) (per curiam), when it has been delegated a public function by the State, cf., e.g., *West v. Atkins* [487 U.S. 42, 56 (1988)]; *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 627-628, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991), when it is "entwined with governmental policies," or when government is "entwined in [its] management or control," *Evans v. Newton*, 382 U.S. 296, 299, 301, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966).

Brentwood, 531 U.S. at 296. Strikingly, notwithstanding the government's protestations to the contrary, the conduct at issue meets at least three of the tests cited by the *Brentwood* Court.

a. USAO Significantly Encouraged KPMG to Withhold Funds

Given the facts set forth in the record, it cannot reasonably be disputed that the USAO and Thompson Memorandum provided "significant encouragement" to KPMG to refuse to pay defense funds. Three authoritative cases demonstrate that KPMG's conduct must be considered state action under this test.

In *Skinner*, the Supreme Court found that the government's "encouragement, endorsement, and participation" in a private railroad's breath and urine testing policies rendered the searches state action. 489 U.S. at 614-16. The Court observed that the government had "made plain not only its strong preference for testing, but also its desire to share in the fruits of such intrusions." *Id*. at 615.

Similarly, in *Chan v. City of New York*, 1 F.3d 96, 106-07 (2d Cir. 1993), a § 1983 complaint alleged that municipal defendants issued Requests for Proposals ("RFPs") that called for wage rates lower than the federal minimum wage. *Id*. at 98-99, 106-07. Although a private employer contracted for and paid the wages, this Court found that the complaint alleged a sufficient nexus between the state and private actors to constitute state action because the municipalities' RFPs encouraged the policies: "to win the Contracts, [the private contractor] was

required to make its bids based on wages below" the minimum wage levels. *Id*. at 107.

Finally, in *Albert v. Carovano*, 824 F.2d 1333 (2d Cir. 1987), a private college suspended a group of students for engaging in a "sit-in" protest, and the students subsequently sued the president of the college for violations of their constitutional rights. *Id*. at 1334. The students argued that the college's actions were "under color of" state law because the college's rules for "Maintenance of Public Order" were promulgated after the State of New York passed legislation mandating that colleges adopt and file with the state a set of disciplinary rules. *Id*. The *Albert* court observed that while the statute did not "on its face . . . dictate the outcome of campus disciplinary decisions, there is still a factual question as to whether the State intended to or did in fact influence college administrators in such a way that it can be considered responsible for the private colleges' decisions." *Id*. at 1340. This Court found that the students had adduced sufficient evidence of such "influence" to forestall summary judgment. *Id*. The evidence suggested that the passage of the statute and state officials' later conduct "strongly influenced" the content of the college's disciplinary code, that the college would not otherwise have adopted the disciplinary rules that led to the students'

suspensions, and that the statute led to a change in the manner the college administration dealt with student unrest. *Id*.

These precedents show that the government need not explicitly require conduct in order to be responsible for it. When the government encourages a private party to perform specific conduct and the private party conforms, the result is state action. Here the government acted specifically to encourage KPMG to withhold fees from its employees who were indicted, and KPMG did just that. The government obviously provided "significant encouragement" for the withholding.

The authorities upon which the government relies do not support a contrary conclusion. In *Blum*, 457 U.S. 991, the Supreme Court analyzed decisions by private nursing homes regulated by the Medicaid regime. The Court held that certain of the nursing homes' decisions with respect to individual patients were not state action. 457 U.S. at 1005-12. The Court found that the fact that "the State responded to [the] decisions by adjusting the patient's Medicaid benefits" did not render the decisions state action because "[t]here is no suggestion that those decisions were influenced in any degree by the State's obligation to adjust benefits." *Id*. at 1005. The Court likewise rejected the argument that the regulations "affirmatively command[ed]" the private decisions because the Court's

"review of the statutes and regulations . . . does not support respondents' characterization of them . . . . [The] decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." *Id*. at 1005-08. Finally, the Court found that regulations providing for penalties for inappropriate treatment "do not dictate the decision to discharge or transfer in a particular case." *Id*. at 1010.

Thus, the *Blum* Court effectively distinguished its case from this case. Here, KPMG responded to the USAO's conduct, not *vice versa*, and KPMG's decisions were "at the least, strongly influenced" by the USAO and the Thompson Memorandum. Likewise, KPMG's decision did not "ultimately turn on judgments made by private parties according to professional standards that are not established by the State," but instead turned on judgments informed by the standards enshrined in the Thompson Memorandum and affirmed by the USAO. Thus, the USAO effectively dictated KPMG's decision to withhold fees. In short, whereas in *Blum* the supposed state action arose from a set of regulations that were not intended to bring about the specific conduct challenged by the plaintiffs, here the government's actions were intended to cause KPMG to withhold legal fees from Ritchie and the other appellees. Thus, at the very least, the USAO significantly encouraged KPMG to withhold funds.

b. The USAO Was A Willful Participant in Joint Activity With KPMG

KPMG was also a "willful participant in joint activity with the State or its agents." The express point of KPMG's capitulation was to *cooperate* with the government investigation of Ritchie and the other KPMG defendants. An entity that cooperates in law enforcement functions engages in "joint activity" with the government for purposes of finding state action. *See, e.g., Abbott v. Latshaw*, 164 F.3d 141, 147 (3d Cir. 1998); *Murray v. Wal-Mart, Inc.*, 874 F.2d 555, 559 (8th Cir. 1989); *El Fundi v. Deroche*, 625 F.2d 195, 196 (8th Cir. 1980); *Duriso v. K-Mart No. 4195, Div. of S. S. Kresge Co.*, 559 F.2d 1274 (5th Cir. 1977) (per curiam); *Smith v. Brookshire Bros.*, 519 F.2d 93 (5th Cir. 1975) (per curiam); *Bame v. Clark*, 466 F. Supp. 2d 105, 109-10 (D.D.C. 2006); *see also Johnson v. Knowles*, 113 F.3d 1114, 1119 (9th Cir. 1997) ("An agreement between government and a private party can create state action.").

Thus, in *Adickes*, the Supreme Court considered a woman's § 1983 suit against a privately-owned restaurant, S.H. Kress & Co, and held that the suit properly stated a constitutional claim:

> Although this is a lawsuit against a private party, not the State or one of its officials, our cases make clear that petitioner will have made out a violation of her Fourteenth Amendment rights and will be entitled to relief under § 1983 if she can prove that a Kress employee, in the course

> of employment, and a Hattiesburg policeman somehow *reached an understanding* to deny Miss Adickes service in The Kress store, or to cause her subsequent arrest because she was a white person in the company of Negroes.

398 U.S. at 152 (emphasis added); *see also Soldal v. Cook County, Ill.*, 506 U.S. 56, 60 n.6 (1992) (citing *Adickes* and declining to review appellate court holding that evidence of cooperation between police and private individual was sufficient to withstand summary judgment). So here, the USAO and KPMG "reached an understanding" under which KPMG cooperated in the investigation and prosecution of Ritchie, and as part of that effort denied Ritchie defense funds.

The government cites *D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155 (2d Cir. 2002), Gov't Br. at 59, but it is not to the contrary. There, the district court found that the private actor acted "independent of governmental influence," and this Court held that the lower court's finding "was not clearly erroneous. We need not address whether the record would have supported contrary findings, inferences and conclusions." 279 F.3d at 162. Here, by contrast, KPMG obviously did not act "independent of governmental influence": the district court found that the government exerted its influence to cause KPMG to withhold funds it would otherwise have paid. Consequently, here it is the government that must overcome the "clearly erroneous" standard, and it cannot.

Moreover, the issue was put to rest when KPMG informed the district court that the Thompson Memorandum "substantially influenced" its decisions regarding legal fees. JA 793.

United States v. International Brotherhood of Teamsters, 156 F. 3d 354 (2d Cir. 1998), is also inapposite. The officials at issue in that case "derive[d] their powers from and act[ed] pursuant to a *private* agreement." *Id*. at 359 (emphasis in original). The private actor in *International Brotherhood* received information from the USAO, but "the receipt of information and assistance from federal authorities does not render the recipient's subsequent, independently rendered *decision* using such information 'fairly attributable' to the government." *Id*. at 360 (emphasis in original). The same cannot be said here. KPMG did not merely receive information from the USAO, and KPMG's decision was *not* "independently rendered" — it plainly resulted from the USAO's pressure. The USAO and KPMG were engaged in classic "joint activity."

c. Government Became Entwined in KPMG's Management

Finally, the USAO became "entwined in [KPMG's] management or control," at least with respect to the payment of Ritchie's defense fees. As discussed, the evidence demonstrates that KPMG cleared its defense-funding

policies with the USAO, and that the USAO was the impetus behind the policies in the first place. For example, the USAO vetted KPMG's letter to its employees concerning the investigation and legal representation, and demanded that the firm supplement the letter with a more favorable statement. Smith A. 491-92, 1296-1309, 1346. The USAO even informed KPMG about which employees were not "cooperating" to the government's liking so that KPMG could pressure those individuals with threats of termination or other sanctions. Smith A. 462, 1216, 1225-29, 1234, 1244, 1290-91. Thus, the USAO was effectively managing the defense-funding policies.

Indeed, the USAO's control and management of the firm went far beyond those particular policies: as part of KPMG's deferred prosecution agreement, the USAO forced KPMG to restructure is business completely — it even abandoned whole areas of its practice. JA 1228-33. KPMG's policies must therefore be considered state action.

E. The Government's Argument Based Upon the Supreme Court's Forfeiture Jurisprudence is Misplaced

The government lastly argues that there was no Sixth Amendment violation because the appellees had no right to use KPMG's money for their defense. Gov't

Br. at 63-66. The government relies heavily upon *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), but that case is inapposite.

In *Caplin & Drysdale*, the Court considered whether the federal drug forfeiture statute was "consistent with the Fifth and Sixth Amendments." 491 U.S. at 619. The parties agreed that "the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *Id*. at 624-25. The Court observed, however, that the proceeds of illegal activity do not properly belong to the defendant — they are forfeited to the government *ab initio*. *Id*. at 626-28. In the Court's view, "there is a strong governmental interest in obtaining full recovery of all forfeitable assets, an interest that overrides any Sixth Amendment interest in permitting criminals to use assets adjudged forfeitable to pay for their defense." *Id*. at 631. The Court rejected "petitioner's claim of a Sixth Amendment right of criminal defendants to use assets that are the Government's . . . merely because those assets are in their possession." *Id*. at 632.

Thus, although the *Caplin & Drysdale* Court employed some broad language, its holding was narrow: the Sixth Amendment does not prevent the government from obtaining its own property from a criminal defendant, even if the

defendant hoped to use that property to fund his defense. The Supreme Court and lower courts have invariably construed the case to stand only for this limited proposition. For example, in *Caplin & Drysdale*'s companion case, the Supreme Court described the *Caplin & Drysdale* holding as follows: "neither the Fifth nor the Sixth Amendment to the Constitution requires Congress to permit a defendant to use *assets adjudged to be forfeitable* to pay that defendant's legal fees." *United States v. Monsanto*, 491 U.S. 600, 614 (1989) (emphasis added); *see also United States v. Farmer*, 274 F.3d 800, 804 (4th Cir. 2001) ("While *Caplin* made absolutely clear that there is no Sixth Amendment right for a defendant to obtain counsel using tainted funds, [a defendant] still possesses a qualified Sixth Amendment right to use wholly legitimate funds to hire the attorney of his choice."); *Winkler v. Keane*, 7 F.3d 304, 308 (2d Cir. 1993) ("In *Caplin & Drysdale*, the issue was whether the federal forfeiture statute violates a criminal defendant's Sixth Amendment rights."); *United States. v. Monsanto*, 924 F.2d 1186, 1190 (2d Cir. 1991) (describing holdings on remand from Supreme Court).

Nothing in *Caplin & Drysdale* stands for the proposition that the government may interfere with *lawful* sources of defense funding. In fact, the right-to-chosen-counsel jurisprudence is to the contrary: the courts have consistently focused on a defendant's *free opportunity* to retain counsel of his

choice. The Supreme Court long ago held that "the right to counsel being conceded, a defendant should be afforded a *fair opportunity to secure counsel of his own choice*." *Powell v. Alabama*, 287 U.S. 45, 53 (1932) (emphasis added). Likewise, in *Flanagan v. United States*, 465 U.S. 259 (1984), the Court taught that the "right to counsel of one's choice . . . . reflects constitutional protection of the defendant's *free choice*." *Id*. at 267-68 (emphasis added). Indeed, in *Caplin v. Drysdale* itself, the Court enshrined the principle that "the Sixth Amendment guarantees the defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire." 491 U.S. at 624-625. And in *Gonzalez-Lopez*, the Court held that the Sixth Amendment "commands, not that a trial be fair, but that a particular guarantee of fairness be provided — to wit, that *the accused be defended by the counsel he believes to be best*." 126 S. Ct. at 2562 (emphasis added); *see also id*. at 2563 ("Deprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants."). The Courts of Appeals cases are in accord. *See, e.g., Serra v. Michigan Dept. of Corrections*; 4 F.3d 1348, 1351 (6th Cir. 1993) ("A criminal defendant who desires and is financially able to retain his own counsel 'should be afforded a fair opportunity to secure counsel of his own choice.'"); *United States v. Moscony*, 927 F.2d 742, 748 (3d Cir. 1991) (under the Sixth Amendment, "a

defendant should be afforded a fair opportunity to secure counsel of his own choice"); *United States v. Koblitz*, 803 F.2d 1523, 1528 (11th Cir. 1986) ("[T]he Constitution requires that a criminal defendant have a fair or reasonable opportunity to obtain particular counsel, and [suffer from] no arbitrary action prohibiting the effective use of such counsel."); *United States v. Burton*, 584 F.2d 485, 488-89 (D.C. Cir. 1978) ("An essential element of the Sixth Amendment's protection of the right to the assistance of counsel is that a defendant must be afforded a reasonable opportunity to secure counsel of his own choosing."); *United States v. Bernstein*, 533 F.2d 775, 788 (2d Cir. 1976) ("Choice of counsel should not be unnecessarily obstructed"); *United States v. Inman*, 483 F.2d 738, 739-40 (4th Cir. 1973) ("The Sixth Amendment right to counsel includes . . . the right of any accused, if he can provide counsel for himself by his own resources or through the aid of his family or friends, to be represented by an attorney of his own choosing. Included also is the right of any defendant to a reasonable opportunity to obtain counsel of his own choosing."); *United States v. Johnston*, 318 F.2d 288, 291 (6th Cir. 1963) ("[I]f a defendant in a criminal case desires to hire his own counsel, in order that the object of the Sixth Amendment be met, such defendant must have fair opportunity and reasonable time to employ counsel of his own choosing.").

Thus, the proper question is not whether Ritchie had legal title to or physical possession of the obstructed funds, but whether the government wrongfully interfered with Ritchie's freedom to retain counsel of his choice. As discussed above, the government did just that: the USAO unjustifiably prevented KPMG from paying for Ritchie's chosen counsel. The district court below and the court in *United States v. Rosen*, 487 F. Supp. 2d 721 (E.D. Va. 2007), recognized that the USAO's conduct enforcing the Thompson Memorandum raises issues similar to those at play when one party tortiously interferes with another's prospective economic advantage. *Stein I*, 435 F. Supp. 2d at 367; *Rosen*, 487 F. Supp. 2d at 729-31. As in cases involving such a tort, the government's interference was wrongful because "when the government's interests are weighed against [Ritchie's] the result is thoroughly one-sided: the government has no legitimate interest in arrangements for third parties to advance . . . attorney fees unless, as is not true here, the advancement is alleged to be part of an actual obstruction of justice scheme." *Rosen*, 487 F. Supp. 2d at 731.[8] "In contrast,

[8] The government asserts that it has an interest in "investigating and fairly prosecuting crime." Gov't Br. at 74 (quoting *Stein I*, 435 F. Supp. 2d). Conceding that interest, it is difficult to fathom how it is served by denying accused persons access to defense funds where, as here, the funds were not being used to obstruct justice. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422

[Ritchie has] an undeniably strong interest — indeed, one protected by the Constitution — in . . . obtaining, without government interference, the . . . fee advances." *Id.*

F. Conclusion

The evidence amply supports the district court's finding that the USAO caused KPMG to withhold funds from Ritchie. Further, it is undisputed that KPMG's action forced Ritchie to abandon his counsel of choice. The government was therefore responsible for the deprivation of Ritchie's right to counsel of choice, a violation that could not be remedied. Consequently, the district court's dismissal of the indictment must be affirmed.

III. THE USAO VIOLATED RITCHIE'S SIXTH AMENDMENT RIGHT TO PRESENT HIS DEFENSE FREE FROM GOVERNMENT INTERFERENCE AND FIFTH AMENDMENT RIGHT TO A FAIR TRIAL

The district court also dismissed the indictment against Ritchie because the USAO violated Ritchie's rights to a fair trial and to present his defense free from government interference. *Stein IV*, 495 F. Supp. 2d at 423-25, 427-28; *Stein I*, 435 F. Supp. 2d at 356-73. With respect to these separate bases for affirming the dismissal, Ritchie is in a position similar to all of the other appellees. To avoid

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U.S. 853, 862 (1975). Impeding a defendant's ability to proffer rigorous partisan advocacy undermines that "ultimate objective."

burdening the Court with repetitive argument, Ritchie adopts and joins each of the arguments and briefs of the other appellees.

CONCLUSION

For all of the foregoing reasons, and the reasons set forth in the briefs of the other appellees, the district court's order dismissing the indictment against Ritchie must be affirmed.

Dated: January 11, 2008
Berkeley, California

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 13,862 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times Roman 14-point font.

Dated: January 11, 2008

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ANTI-VIRUS CERTIFICATION

Case Name: USA v. Stein

Docket Number: 07-3042-cr

I, Samantha Collins, hereby certify that the Appellee's 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 1/11/2008) and found to be VIRUS FREE.

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